DATELINE '77

THE PRESS AND THE LAW

OVERSEAS PRESS CLUB OF AMERICA

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MESSAGE FROM THE PRESIDENT

WILLIAM SONNTAG

The overwhelming defeat at the polls of Prime Minister Indira Gandhi signaled the return of democratic government to India and the return of freedom of the press to the world's oldest and largest democracy. During the state of emergency proclaimed by Mrs. Gandhi in June 1975, three major publications were closed, and one dispatch reported that 7000 journalists had been jailed.

Shrikumar Poddar, an Indian in permanent residence in the United States, was one whose passport the Indian government revoked. When Poddar complained that there was little or no interest in this country about democracy and freedom of the press in India, the OPC arranged a panel discussion for August 17, 1976. Joining Poddar were Ravi Chopra, a doctoral student at Stevens Institute, and Dr. Homer A. Jack, secretary general of the World Conference on Religion and Peace at the U.N. and an expert on Indian affairs.

The OPC provided a similar forum for Christopher A. Nascimento, minister of state for openly Marxist Guyana. Guyana had requested an opportunity to challenge certain press reports, and the OPC agreed to provide the forum, on May 18, 1976, if Nascimento would agree to answer questions from the press.

Both *Time* magazine and the New York *Times* had reported that there were Cuban troops in Guyana. The *Times* also said that Guyana "had promised Cuba it could use Guyana airfields to transport troops and supplies for Cuban forces in Africa." But within a week after Nascimento's OPC appearance, the *Times* published a front-page story—plus another story the following day—carrying disclaimers. And in a subsequent issue, *Time* also backed off.

On July 8, Julio Scherer Garcia was ousted as editor of *Excelsior,* Mexico's only liberal newspaper, along with 200 members of his staff, by a dissident minority group backed by the Mexican government. The OPC telegraphed a strong protest to President Luis Echeverria Alvarez and scheduled a July 29 press conference for Scherer. This had to be canceled when Scherer was forbidden by his government to leave the country. Subsequently, a request came that the new editor be given the chance to explain his position at the OPC. But when the Club insisted that Scherer also be allowed, the request was withdrawn.

The OPC last year pursued with the Department of State and the House Select Committee on Missing Persons in Southeast Asia the fate of 21 journalists who are still missing there.

When it became known that the CIA had employed journalists as undercover agents, the OPC lodged objections with former director George Bush. His office replied: "Effective immediately, CIA will not enter into any paid or contractual relationship with any full-time news correspondents accredited by any U.S. news service, newspaper, periodical, radio or television network or station."

On May 27, a strenuous objection was sent to Ambassador Anatoly Dobrynin of the U.S.S.R. when Moscow claimed that George A. Krimsky of the Associated Press, Christopher S. Wren of the New York *Times* and Alfred Friendly, Jr., of *Newsweek* were associated with the CIA. This was followed by another protest when Krimsky was expelled from Moscow—and a similar protest to the Czechoslovakian ambassador when newsmen were harassed in that country. The OPC also protested the expulsion from Nigeria of John Darnton of the New York *Times.*

In order to expand its activities of this kind, and to take part in combating efforts in UNESCO of the Soviet Union to restrict the flow of news within Third World nations, the OPC has joined the World Press Freedom Committee.

The OPC is aware also of threats to freedom of the press in this country. The Reporters Committee for Freedom of the Press, which keeps watch on Congressional legislation, at last count listed 63 bills that would affect our First Amendment rights.

Over the memorial plaques in the Club headquarters is written: "These colleagues died serving a free press for a free world." The names are all of newspersons who died abroad as the OPC's annual awards are all for reportage abroad. I have therefore decided to honor with the President's Award a man who was murdered last June while pursuing his profession as a reporter in Phoenix, Ariz. His name: Don Bolles (see page 49), the son of the late Donald C. Bolles, a former OPC member.

MATT BASSITY

DATELINE '77

A PUBLICATION OF THE OVERSEAS PRESS CLUB OF AMERICA
THIS ISSUE PRODUCED BY THE READER'S DIGEST

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Printed by Pennyfeather Press

For The Reader's Digest

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Assistant: Linda H. Boes, The K. S. Giniger Company

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Assistant: Mary Novick, Overseas Press Club

"The experience in Dallas during November 22-24 [1963] is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial" —WARREN COMMISSION REPORT

MURDER IN NEBRASKA

By FRED W. FRIENDLY

At 8 on the night of October 18, 1975, KNOP, the only television station in North Platte, Neb., began transmitting the NBC Saturday-night movie, *The Deadly Tower.* This film is a dramatization of the 1966 massacre of 16 persons and the wounding of 3 others by Charles J. Whitman, a sniper atop the University Tower in Austin, Texas. By uncanny coincidence, the movie was about to provide the electronic backdrop for another grotesque mass murder.

At about 9:18, Don Feldman,KNOP's only full-time newsman, answered a frantic call from the sheriff's office. "Something terrible has happened in Sutherland," shouted a deputy. "Hop [Sheriff Gordon (Hop) Gilster] wants you to put the following warning on the air immediately: 'Everybody lock your doors and windows. Don't answer your door without a thorough check of the person knocking or ringing your doorbell. There's a sniper loose with a shotgun, and he's killing people.' "

Feldman demanded proof that the "sheriff's deputy" was not some crank. He arranged to return the call to the county jail to confirm that the panicky warning was coming from an official source, and he told the deputy that he would require more details than "something terrible has happened." After several phone calls, including one short-wave-radio call to Hop, who was 22 miles away at the scene of the crime in Sutherland, KNOP aired an "interrupt bulletin" to report that there had been a killing and that "everyone should lock their doors and windows and admit no one."

It was 9:37, and the alarming announcement was superimposed on a picture of Whitman's killing by Texas police.

For the residents of Sutherland (population 840) and North Platte (population 23,000), the announcement began a night of terror—dozens of police cars flashing their red lights, policemen setting up roadblocks and searching every back yard, a television-news helicopter from Denver hovering overhead. Routine sounds suddenly became frightening alerts to many families who sat in darkened parlors with firearms at the ready.

By morning, the television and radio audiences of Sutherland and North Platte learned that six members of the James Henry Kellie family had been murdered, and that a suspect had been arrested. He was identified by the sheriff, the wire services and broadcast stations as 29-year-old Erwin Charles Simants, who lived with his sister and brother-in-law in the basement of the house next door to the Kellies.

That might well have been all—another story of small-town murder, similar for its luridness and senselessness to *In Cold Blood.* Yet the case of Erwin Charles Simants was headed for greater significance from the moment of those first broadcast bulletins on the night of October 18. Chance and politics would combine to make it the focus of a major constitutional debate, one pitting the defendant's right to a fair trial, embodied in the Sixth Amendment to the Constitution, against the press's First Amendment right to print the news and the public's right to know.

When a person is arrested and charged in a sensational murder, journalism requires a combination of diligence to inform the public and sensitivity to protect the rights of the defendant. The reporting prior to a murder trial is recognized as especially critical, since prejudicial publicity implicating the suspect may make the selection of an impartial jury difficult. Mindful of this problem, law-enforcement officers take care to refer to the people they arrest as "suspects" rather than as "murderers," and reporters speak only of their "alleged" criminal acts. Yet the influence of the media has been a source of continuing concern to those who feel strongly about protecting the rights of the accused.

In the 1950s and '60s, "Roman circus" trials such as the Sam Sheppard murder case, the Billy Sol Estes scandal and the television "conviction" of Lee Harvey Oswald and Jack Ruby spurred harsh criticism of the courts and the press. The development of electronic journalism may have been an important factor—the rapid, often emotional portrayal of events in the aftermath of a crime could easily distort the facts in the minds of potential jurors, perhaps irrevocably. In any case, the belief that Dr. Sam Sheppard's right to a fair trial had been violated by flamboyant press coverage of his wife's murder, and his trial for it, led the Supreme Court to void his first trial and order a new one. The editor of the Chicago *Daily News,* Everett Norlander, was prophetic when he warned that "the press will be answering its critics for years to come on what was done with this story."

In the Estes case, the Supreme Court likened the live television coverage of the proceedings to a Fidel Castro prosecution in the Havana sports arena. And the Warren Commission's report on the assassination of President Kennedy concluded that the "experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."

One result of this concern was the American Bar Association's Reardon report of 1968, which set up guidelines for the legal profession in its dealings with the press during criminal-justice proceedings. The goal was to ensure that fair trial could peacefully coexist with

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Condensed from New York Times Magazine (March 21, 1976) and New York Times (July 4, 1976), © 1976 by New York Times Co., 229 W. 43 St., New York, N.Y. 10036

free press. Many states adopted the Reardon proposals by establishing their own voluntary guidelines. In 1970, a blue-ribbon panel of Nebraska journalists, judges and lawyers agreed on a voluntary code. In reporting pending criminal litigation, the media would not reveal a suspect's prior criminal record, or that he had made a confession, nor would they offer any opinions about his guilt, or his character, or the outcome of his trial.

In many cases, however, such voluntary guidelines did not seem to have much effect, and judges, concerned that their trials remain valid, began to issue gag orders and prior restraints on the press. These orders have not been upheld when challenged by the press. Still, journalists were deeply troubled by the increasing willingness of judges to issue them. So the battle lines had been drawn for some time in what one country editor called "the war between the First and Sixth Amendments." After the Sutherland murders, the battle was joined.

"I Killed the Kellies"

Sutherland is a bleak prairie village that vibrates when the long Union Pacific freight trains thunder through. Its people—ranchers and railroad workers and, at the time, construction men building a state power plant—view North Platte with the suspicion with which North Platte views Omaha and Omaha views New York. In North Platte and Sutherland, gun-control laws are fighting words; they are seldom even discussed in a community where virtually every home has a gun and many have prized gun collections.

So it was not unusual that Erwin Charles Simants, an unemployed handyman and fence builder with an I.Q. of 75, should have access to the .22-caliber rifle in the home of his brother-in-law, William Boggs. On the evening of October 18, Simants—called Herbie by members of his family—borrowed the rifle and crossed the narrow yard to the house of James Henry Kellie, where he found 10-year-old Florence Kellie. He raped her and killed her; powder burns on her forehead indicated she had been shot at point-blank range.

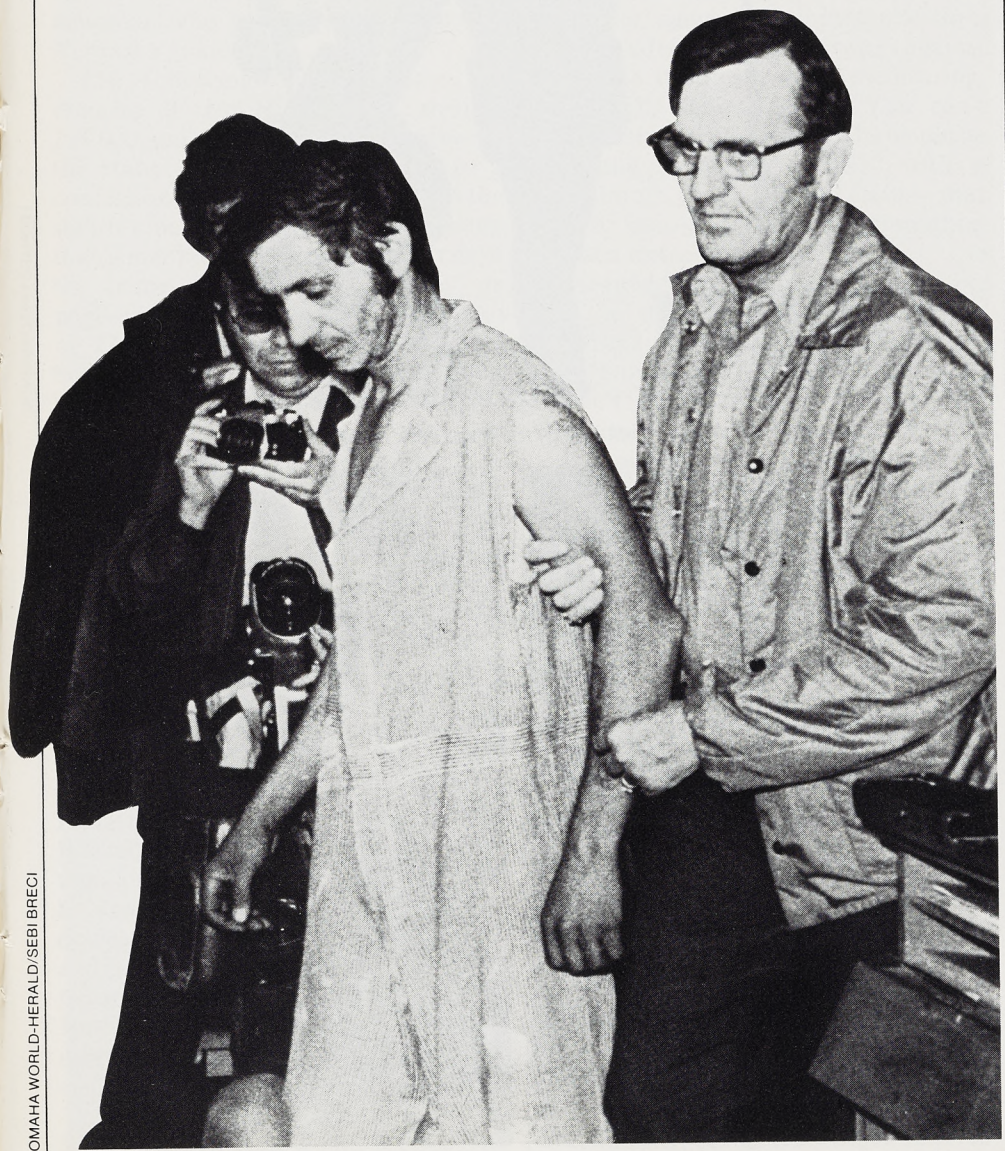
Other members of the Kellie family, who were not in the house, heard the child screaming, went inside, and were murdered as the frightened Simants attempted to eliminate all witnesses. They included James Henry, 66; Audrey Marie, 57; Deanna, 7; Daniel, 5; and David, 32.

Even hardened state-police investigators were shocked by the fury of the massacre and the strong implication, later documented in part of Simants' statement, that there had been sexual assaults even after death.

After the shootings, Simants returned the rifle to his sister's home and told his 13-year-old nephew, Butch Boggs, "I've just killed the Kellies." At Simants' request, Butch phoned the elder Simantses, Amos and Grace. Simants told his mother about the murders and said, "I'm coming home." His father, a railroad worker, told Herbie he didn't believe the story, but he was going over to the Kellies' to see for himself.

When Amos Simants opened the door of the Kellie residence, he was sickened by the sight and scent. Shaken, he returned home and told his wife to call an ambulance and the police. He also told his son to turn himself in. Simants instead stopped by the Rodeo Bar, across from the Union Pacific railroad tracks, and had a beer. Then he walked west to the Longhorn Bar, drank one more beer, and fled into the high weeds behind the Kellie and Boggs houses, where he hid through the night. Shortly before 8 a.m. Sunday, he walked to the back door of the Boggs house and was immediately arrested by a state-police officer and Sheriff Gilster.

Whatever transpired in the deepest, darkest, most twisted part of this man's mind, to paraphrase Simants' defense lawyer, may never be known. But much of what happened in the Kellie house that night was known within hours by the Sutherland community. The news spread by the kind of grapevine that exists in a town this size. Also, an attendant on duty at "the light plant"—the local power-company office, which doubles as a 24-hour-a-day message center for fire, police and other information—was dispensing a chatter of fact, hearsay and short-wave jargon as



OMAHA WORLD-HERALD/SEBI BRECI

Erwin Charles "Herbie" Simants, under arrest, charged with rape, murder, and worse

it came in from ambulance attendants, deputy sheriffs and town officials.

But the reporters and cameramen, pouring in from all points in western Nebraska, and by chartered planes from Omaha, Lincoln and Denver, found it difficult to obtain any official information about the case. Pressured by their night editors for more facts, they confronted law officers whose emotions were already charged by the night's gruesome events and the continuing search for the murderer.

Incriminating Remarks

The deputy county attorney, Marvin Holscher, established a sort of imaginary police line at the hedge in front of the Kellie residence. "Goddam it, I'm not going to try this case on the lawn of this house, or in the media," he yelled. A reporter from the Omaha *World-Herald,* according to Holscher, shouted back, "You're not telling us what happened. I'm going to make you look like an ass." (The reporter, Frank Santiago, remembers it differently: "You're going to make an ass of yourself, Holscher.") The chief prosecutor, Milton Larson, recalls shouting, "There's a TV helicopter overhead—and we haven't even gotten the six bodies out." It was hardly an atmosphere to nurture the spirit of the Nebraska bar-press voluntary guidelines for pretrial reporting, and over the next several days the guidelines seemed all but forgotten by journalists as well as lawmen.

At 1:43 a.m. the A.P. was finally able to transmit a story with the names of the victims, and the fact that Simants, a neighbor of the Kellies, was being sought. Sheriff Hop Gilster, so excited he had suffered a slight heart attack, revealed to some reporters that the murder weapon, a .22-caliber rifle, was in police custody. According to a 6:37 A.P. bulletin, he also stated that "Simants apparently told his father he was responsible for the killings." The U.P.I. called Simants' parents, and transmitted a story reporting their statement that he had confessed.

By 9 that morning, Simants had been booked, stripped of his clothing and boots, which would be used as evidence, and had listened three times to the "Miranda card" warning that statements he might make could be used against him. Now he was making a confession in which he admitted to the murders and sexual assaults. He answered no when asked if he had been watching television the previous night.

This confession was not officially reported to the media, but 30 minutes earlier, prosecutor Larson was quoted by the A.P. as saying, "Simants apparently walked to his father's home after the shooting and told his father he was responsible for the deaths." The A.P. now says it erred: hearsay of the ambulance driver's husband was falsely attributed to Larson.

Later that Sunday morning, Sheriff Gilster held a news conference, at which he went far beyond the guidelines that preclude "opinions concerning the guilt, the innocence, or the character of the accused."

REPORTER: It didn't surprise you [when a woman called the fire station to say Simants was out in the back yard]?
SHERIFF: It didn't surprise me.
REPORTER: Why didn't it?
SHERIFF: Well, a lot of times they say they return to the scene...

Their problem: restrict press coverage of the preliminary hearing, so reports of unsavory details would not prejudice jury selection?

Judge Ronald Ruff: "I kept thinking of Sheppard v. Maxwell..."

Prosecutor Milton Larson

Judge Hugh Stuart

LEONARD FREED/MAGNUM

REPORTER: You mean—after he shot those people, he went in and got a drink in a bar?
SHERIFF: Yes.
REPORTER: Why did he kill these people?
SHERIFF: I can't say at this time.

Radio stations and the A.P. and the U.P.I. reported Sheriff Gilster's revelations Sunday afternoon and evening in considerable detail. However, what seemed most irresponsible to the judges and lawyers in the proceeding was a television report received by Channel 2, KNOP, from the NBC network; it was aired on the news that night and on the "Today" show the following morning. Jim Lee, a reporter for KOA-TV in Denver, had flown in by chartered helicopter the night of the crime and flown back to Denver on Sunday after the sheriff's news conference. He told his audience that "Simants reportedly confessed to his father and then fled." The statement was fed in to North Platte, via New York, by a Denver-based newsman who had never heard of any Nebraska guidelines.

The following day, Monday, the Omaha *World-Herald,* circulation 238,000 and the dominant newspaper in the state, omitted any reference to a confession and did not report any of the sheriff's incriminating remarks implying that Simants had returned to the scene of the crime. However, the lead of its page-one story read like something out of *The Front Page:* "He was called a hothead, a loner, a drinker by those who knew him, but Erwin Charles Simants, suspected of killing six here Saturday night, remains an enigma to many."

The Monday edition of the North Platte *Telegraph,* circulation 17,000, devoted all but six inches of its front page to the mass murder, including a report that "the elder Simants tearfully said, 'My son killed five or six people here.' "

A Can of Worms

Enter now, two judges. Hugh Stuart is an experienced and respected district court judge with a reputation for running a disciplined courtroom. Ronald Ruff, in his mid-30s, is an unassuming Lincoln County judge used to sitting on trials involving misdemeanors such as speeding violations and petty larceny. There is little love lost between them. Judge Stuart, says Judge Ruff, "once accused me of being the most immature and incompetent judge he had ever met."

Although the trial would be held in Stuart's court, Ruff would preside over the preliminary hearing required to establish that cause existed to hold Simants for trial. (In Nebraska, the preliminary hearing serves the function of the grand jury.) Judge Ruff dreaded the inflammatory aspects of the sordid Simants case, and the possibility of reversal. "I kept thinking of *Sheppard v. Maxwell*... I didn't care what was in the newspaper; I just didn't want to be reversed," he says.

> "I didn't care what was in the newspaper; I just didn't want to be reversed"
> —JUDGE RONALD RUFF

So Ruff consulted Judge Stuart about the possibility of closing the hearing to the public, and restricting press coverage so the details of rape and necrophilia wouldn't be reported and broadcast over and over again before jury selection. Stuart advised that it was against Nebraska statutes to close the hearing. He recalls telling Ruff, "You can't restrain the media," and that he would be "opening a can of worms" with a restraining order. (Ruff claims that Stuart was vague and noncommittal about a restraining order.)

Meanwhile, Larson, the prosecutor, was on the telephone consulting the Nebraska attorney general, Paul Douglas. "Don't do it," Douglas told him. "Don't ask the court to put that restraining order on."

In spite of such admonitions, the prosecution and the county defender both moved that the news media be gagged. The county defender also asked that the preliminary hearing be closed, which Judge Ruff refused to do. But he did direct that there could be no reporting of any testimony or evidence produced at the hearing. "When these two constitutional provisions come into conflict, the right of the free press must be subservient to the right of the accused to have due process," he declared. He cited the Supreme Court in *Sheppard v. Maxwell:* "If publicity during the proceedings threatens the fairness of a jury trial, a new trial should be ordered." Ruff somehow read that as authority for restraining orders and proclaimed, "This judge is not going to abdicate his duty." He further ordered that the Nebraska bar-press guidelines be mandatory.

Ironically, Judge Ruff never believed for a moment that his restraining order would be obeyed. "Me, gag the powerful Omaha *World-Herald* and the Lincoln *Journal* and the Chicago *Tribune?"* And many in and out of Nebraska news and bar circles asked why the gag order, considered unconstitutional by many authorities from the start, was not defied. But Nebraska newspaper executives, conservative in nature, do not believe in civil disobedience; they decided to fight it out in court.

"I Just Wanted Restraint"

Meanwhile, the preliminary hearing went on, with reporters barred from revealing any of the evidence or testimony produced—even though the courtroom was open to the public. Those who attended got their money's worth. The hearing took up almost a full day of court and included the testimony of nine witnesses, who spelled out many of the gruesome details of child molestation and other horrors. Judge Ruff permitted this anomalous situation—inadvertently providing sensational information for the local rumor mills while professional communications outlets remained gagged—because he was apprehensive about cutting off whatever record the prosecution wished to establish. Yet had he chosen to limit the testimony, he could have had an adequate preliminary hearing without having to restrain the press.

While the local press continued to obey the gag, spokesmen for the Nebraska news organizations appealed the order to Judge Stuart. After a hearing on October 23, he decided to terminate Judge Ruff's order and initiate his own more carefully drawn restraining order. He prohibited the press from publishing any confession or admission of guilt by Simants, the results of the pathologist's report, the identity of the victims who had been sexually assaulted, or any description of those crimes. He agreed the Nebraska bar-press guidelines should be mandatory. He also prohibited the press from reporting the specifics of the gag order.

The judge is painfully aware that this decision to continue the gag was inconsistent with his earlier advice. "I just want those nine Justices to understand the position I was in," he later said. Stuart feared he could not lift Judge Ruff's gag without exposing himself to the threat of reversal—and the thought of the community buzzing about the necrophilia haunted him.

Critics suggested that a change of venue would have served the Sixth Amendment without impairing the

First. But in Nebraska, a state law prescribes that if a trial is moved, it must be to an adjacent county. Lincoln County's neighbors are all exposed to the same media.

For the national press, meanwhile, Simants was a name hardly mentioned, but the Nebraska gag order was emerging as an important story. On October 29, the Nebraska publishers contacted the Reporters Committee for Freedom of the Press, a Washington-based legal-defense fund. Stung by a dozen prior restraints against publication in a period of a year, national media organizations decided this was the case they had been waiting for. At a council of war in Omaha, the Reporters Committee urged the Nebraska Press Association—if the Nebraska Supreme Court continued to procrastinate in considering the case—to appeal Judge Stuart's restraining order to the highest court in the land. And so, under a provision by which an urgent constitutional issue can proceed to a single Justice of the Supreme Court for immediate relief after state-court appeals have been exhausted, Justice Harry A. Blackmun was asked to intervene and expedite.

On November 20, Blackmun held that the Nebraska bar-press guidelines could not be made mandatory in a restraining order because they were "riddled with vague and indefinite admonitions." He also said the press could report on the pathologist's tests and details of sexual assaults. However, he left standing the prohibition on publishing confessions or admissions of guilt or other items "strongly implicative of the accused." The Nebraska Supreme Court, when it finally caught up with him 11 days later, agreed.

Now the goal of the Nebraska Press Association and its grand alliance was to persuade the full Supreme Court to vacate immediately that part of the original gag which remained. "We were fighting for principle," said Joe R. Seacrest, whose family owns the Lincoln *Journal* and the North Platte *Telegraph*. "We had no intention of publishing confessions or violating the spirit of the guidelines, which I helped to write. But we wanted to do it voluntarily, not have some judge order us what not to print."

Judge Ruff, now completely out of the case, couldn't believe his original gag was reaching such Olympian heights. "I just wanted the record to show that I wanted restraint." And, added the county judge rather plaintively, "just on this one case." Yet those on the other side viewed this one case as "sweeping precedent" that would sanction prior restraint if permitted to stand.

> "All they done was tell the truth"
>
> — HERBIE SIMANTS, WHEN ASKED IF HE HELD ANY RESENTMENT TOWARD MEMBERS OF HIS FAMILY WHO TESTIFIED AGAINST HIM

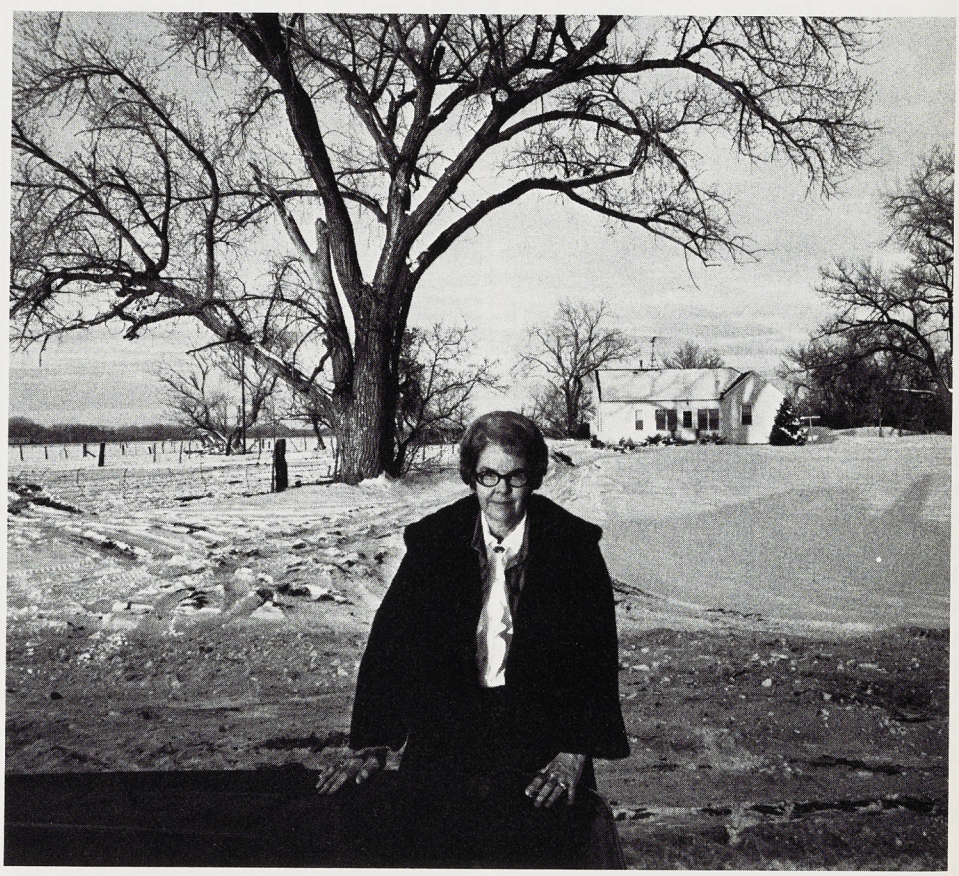
Principles in Conflict

For most of our history, restraints on the press were argued in the state courts. Because the First Amendment was long considered to apply only to actions of the federal government, it was not relevant to these state proceedings. Not until 1925 did the Supreme Court declare that First Amendment freedoms were so fundamental to the Anglo-American legal tradition that no state could abridge them.

For decades after that, however, the Court resisted having to rule on a confrontation between the First and the Sixth Amendments. In a 1941 contempt case, *Bridges v. California,* Justice Hugo Black articulated this reluctance: "Free speech and fair trial are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Nevertheless, the Court did in some decisions go out of its way to acknowledge that the First Amendment is not to be considered absolute.

The Court's first prior-restraint case, *Near v. Minnesota,* came in 1931. In a close decision overturning a state-court ban on publication of an anti-Semitic scandal sheet, the Supreme Court held that "it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication"—even though a publisher might later be sued for libel. But Chief Justice Charles Evans Hughes spelled out a number of exceptions. "No one would question," he wrote, "but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." He also excepted obscenity and incitements to violence.

Not until 1971, when the Nixon Administration tried to prevent publication of the Pentagon Papers, was the Court again forced to rule on the place of prior restraints under the First Amendment. The Court refused to ban publication because of "the extraordinary protection against prior restraints enjoyed by the press." But a majority of the Justices made clear again that the ban on prior restraints could not



LEONARD FREED/MAGNUM

Juror Loostrom: "I've raised a family. I know you have to hear both sides"

be absolute where publication would "result in direct, immediate, and irreparable damage to our nation or its people."

Curiously, the Court for the first time suggested the validity of gag orders in criminal trials in its opinion on *Branzburg v. Hayes,* a case involving reporter's privilege. It had nothing to do with the fair-trial/free-press issue. But in dictum—gratuitous language addressed to a question not at issue in the case—the Court said that journalists could be prevented from "attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."

By December 1975, however, the Court seemed to have concluded that a genuine conflict existed between the First and Sixth Amendments, which must be confronted and resolved. Courts all over the country were issuing gag orders. From 1967 through 1973 there had been 12 such cases. But in 1974 there were 13; the following year, 14; and in the first six months of 1976 there were 11 cases. So, in the kind of judicial roulette that singles out a *Dred Scott* or a *Miranda,* the Supreme Court determined that *Nebraska Press Association v. Stuart* came at the right time. It decided to take the case.

Fair Trial

Almost as an anticlimax to all the constitutional maneuvers, Erwin Charles Simants on January 5 went on trial in Judge Stuart's courtroom. After the first day the jury selection was opened to the public, but when Judge Stuart required that the reporters each sign an agreement restricting the use of certain material that might come up, the press, on advice of counsel, refused to attend.

Of the 130 citizens called for jury duty, 72 were examined on *voir dire.* More than a third of those screened told the judge they had already formed an opinion on the murders. Of that group, less than half identified the media as the source of their prejudgment. Ironically, in view of the gag orders, four who said they had an opinion were accepted as jurors because they said they could still view the evidence with an open mind. Once the jury was sequestered and told not to read and to avoid broadcast news reports, the gag was lifted.

Simants, on the recommendation of the public defender, pleaded innocent by reason of insanity. There were seven days of extremely conclusive testimony, including the playing of Simants' painfully explicit statement, before a courtroom packed mostly with high-school civics students bused in from Sutherland and other communities.

> "Your absolute right to swing your arms ends where my nose begins"
>
> —JUDGE HUGH STUART, TO A NEWSMAN

On January 17, Simants was found guilty of six counts of murder in the first degree. Twelve days later, Judge Stuart sentenced him to death in the electric chair*—making him probably the first citizen in history to have his case involved in two separate debates before the Supreme Court in the same session: on prior restraint, and on the constitutionality of the death penalty. When I asked Simants if he held any resentment toward members of his family who testified against him, he replied: "All they done was tell the truth." He believes he got a fair trial; so does the jury.

After the verdict, Judge Stuart asked members of the jury if they could have viewed the case objectively had they known of Simants' admission to his family, or read in the newspapers his official confession to police. (Note that this formal confession was not read at the pretrial hearing; so, gag or no gag, it could not have been reported.) Only the foreman, Richard Anderson, answered yes.

Yet in subsequent interviews, some of the jurors acknowledged considerable prior knowledge of the case. Anderson said his first impressions about Simants came from watching Sheriff Gilster on television the day of the arrest. However, because of his occupational training as an insurance adjuster, he said, "I don't believe anything to be a fact until it is documented and proven."

Mrs. Beulah Loostrom, who, with her husband, John, runs a 13,000-acre farm in Brady, says she knew most of the details of the sexual assaults, knew of the father's statement about Simants' guilt, saw Gilster on television, yet thought she was able to be an impartial juror. "I've raised a family. I know you have to hear both sides," this grandmother says.

Eugene Seaton, another juror, works on the county road crew and runs his own small farm. He believes in the wisdom of the judge's gag order. "Yes," he says, weighing his words carefully, "it would be very hard to put anything I heard before the trial out of my mind."

Juror Robert Gerrard, a superintendent at the North Platte Gas Company, says he knew most of the details about the murders and sexual assaults "from hearsay and some from newspapers and radio." His wife, Elsie, remembers hearing all the gruesome facts the Wednesday after the crime, when she went to the beauty parlor. "My hairdresser's husband is a cousin of the Kellies." Gerrard says he had known "the Simants boys were a bunch of hoodlums. My son went to school with one and they were always beating up people." But Gerrard feels he was able to separate these preconceived notions from the evidence in the trial.

There is no right answer when two constitutional principles meet head to head. When Judge Stuart told a newsman, "Your absolute right to swing your arms ends where my nose begins," he was identifying the distrust of many citizens for zealots on both sides who would push competing rights past their outer limits.

The judges involved in this case had a justifiable fear that the reporting of certain information would prejudice a jury. The press could make an equally persuasive argument that the courts should not get involved in the gag-order business, for it is hard even for judges to agree on just how much the press can be restrained. In fact, the conflicting ways in which four courts chose to modify the prior restraint in the Simants case stands as convincing evidence that a "can of worms" may in fact be the result when the courts begin to prescribe pervasive rules of what can and cannot be reported.

Persistence of a gag is another point to be noted. The original Ruff order as modified by the higher courts had a life of two and a half months. In cities such as Omaha, Denver or Los Angeles, clogged court calendars could stretch such gags much longer.

So the Simants case, marred by overkill and misunderstanding from the moment the sheriff's deputy placed the first hysterical phone call to Channel 2, raises questions and teaches lessons. Guidelines, Miranda cards and copies of the Constitution mean nothing if the people who hold them have not stopped to consider what they mean when transposed from abstract concepts to real-life situations. Events such as the Sutherland murders come crashing

*His scheduled execution has now been stayed.

LEONARD FREED/MAGNUM

down without warning. Those involved in such an event—police, reporters, judges—have little time to reflect, and never a second chance.

The Final Word

On June 30, 1976, the U.S. Supreme Court declared the Nebraska gag order unconstitutional, and assumed a generally strong stance against such orders. The Justices were unanimous, but they required five different opinions to express that unanimity. Chief Justice Warren E. Burger spoke for all in saying: "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.... In this case, the heavy burden imposed as a condition of securing prior restraint was not met...."

Would a prior restraint to ensure a fair trial *ever* be permissible? Justice William J. Brennan, Jr., would go all the way with the First Amendment. Joined by Justices Potter Stewart and Thurgood Marshall, he wrote, "There can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal-justice system."

But Justices Burger, Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist leave the door ajar: "However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair-trial rights that would...justify restraint."

All nine Justices did agree that once a public hearing has been held, what transpired there cannot be gagged. If a gag order is issued, it must be specific and narrow; the Nebraska court's reference to information "strongly implicative" of the accused was held vague and overly broad. Trial judges have been told to pursue every possible alternative to prior restraint: changing venue, postponement, careful examination of prospective jurors, sequestration of jurors during trial. Moreover, citing recent sensational cases, the Chief Justice asserted that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." But the implicit message is that a gag order might still be a legal last resort.

The Chief Justice posed tests of the utmost difficulty to be met before such an order could be issued. There must be a high degree of certainty—not mere speculation—that without it a fair trial would truly be denied, and that no alternative would work. It must also be demonstrated that a gag would be truly effective: grapevine communication in a town like Sutherland makes it meaningless. In only the rarest of cases could a prosecutor make such a showing.

Some questions remain unanswered. Can and should judges close preliminary hearings as an alternative to a prior restraint? To what extent may judges instruct lawyers and witnesses not to speak to reporters? Justice Brennan suggested just such a remedy: "Judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press." But these sometimes-used procedures raise serious First Amendment questions, which could create the next wave of fair-trial/free-press litigation.

The press "won" the Nebraska case, but victories of principle are never cheap. It was Justice Brennan, who would have made the victory total, who also described the responsibilities of the American press as "enormous."

MORE TESTS TO COME

By JULIAN GOODMAN

The press, broadcast and print, is no more an enterprise of angels than is anything else. It has shortcomings. Its work often takes it into conflict with the work of other institutions. Its rights do not always happily co-exist with other rights under the same Constitution. Yet history has shown our free-press system to be the most effective guardian of the public's right to know. Out of it has come the best informed—the most freely informed—public in the world.

After 200 years, it is very hard to imagine American society without its First Amendment guarantee of free speech and a free press. Here there are plenty of voices the reader, listener or viewer can choose from. Yet 80 percent of the world's population today do not have such free choice. They have only one choice—government-controlled information.

The sad part is, in many countries it didn't start that way. Strong constitutions were built on a respect for human rights and free expression. They ensured independent thought and independent journalism. They put truth and the will of the people before the will of authority. But governments, in the course of governing, do come to look upon news media as political and ideological tools to be shaped for the government's own purposes. When that happens—in *any* country—the seemingly strong tradition of a free press can erode. All too often around the world, it has evaporated completely.

If we think it cannot happen here, we take a lot for granted.

We like to look on the First Amendment as an absolute guarantee of freedom of speech and of the press. But it is not absolute, never was—and it will always be tested.

While restraints have been imposed on American newsmen for all of our years as a nation, such efforts have grown alarmingly in recent years. At last count there were 63 pieces of legislation affecting the press awaiting action in Congress—bills dealing with fair trial/free press, confidentiality, privacy, libel, prior restraint, freedom of information, broadcast licensing, equal time, the Fairness Doctrine. Some of these bills would protect the rights of newsmen, others diminish them. It is all pretty much a tug-o-war, and a sorry reminder of how far the drive for effective laws shielding the rights of American newsmen *hasn't* come.

I don't know that the answer to the many problems newsmen face lies in shield laws, guidelines or legislated codes of conduct. Perhaps our best hope is in ourselves, with individual journalists and their organizations asserting their own rights, as forcefully and as tenaciously as they can, in every instance of a major infringement of press freedom.

So far, in the tests put before us in all these years of our nation's history, we have not failed.

But there are many more tests sure to come.

Julian Goodman is chairman of the board, NBC. These paragraphs are excerpted from a talk he gave at the OPC in November.

The ABC Evening News
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Often, facts the public urgently wants to know are "personal matters" an individual urgently wants kept out of the spotlight. At that point, troublesome questions arise about invasion of privacy

WHEN IS IT FIT TO PRINT?

By HOWARD SIMONS and JOSEPH A. CALIFANO, JR.

In his book *Privacy and Freedom,* Alan Westin defines privacy as "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others." Elsewhere it has been more simply defined as "control over knowledge about oneself."

Most discussions of privacy in textbooks and articles by civil libertarians reflect Orwell's *1984* fear factor. Their concerns relate to electronic surveillance, government searches and seizures of homes and persons, psychological and polygraph testing, and the unprecedented accumulation of data by major public and private institutions. Credit bureaus, governments, large corporations, employers and newspaper morgues—with an assist from computer technology—possess burgeoning data banks of information about individual Americans. Privacy issues resulting from this "electronic tattooing" of the American citizen are of little concern to the newspaperman, except insofar as they are newsworthy in themselves.

When the reporter and editor talk about privacy, they speak of their right to print facts that they consider are not or should no longer be private. The most glamorous issues arise in connection with public officials. But the problems in newsrooms more often arise in connection with private individuals who find themselves the potential subject of public attention.

The basic law of privacy invasion has been simply stated for years:

☐ Appropriation of an individual's name or likeness to advertise another's product or promote his business, without consent of the individual, constitutes an invasion of privacy.

☐ An uninvited entry into an individual's home, or eavesdropping or prying, or trespassing to take pictures, can also constitute an invasion of privacy.

☐ Publicity which places private aspects of an individual in a false light in the public eye creates a cause of action for invasion of privacy somewhat analogous to libel.

☐ Where statements or depictions are humiliating but true (thereby precluding a libel suit), an actionable invasion of privacy may nevertheless be involved where the facts are indeed private (that is, not part of the public record or visible to public scrutiny) and, if made public, would outrage the community's notions of decency.

A brief reading of these basic principles provides no answers to the difficult questions reporters and editors face daily. True, some judgments are almost self-evident. Under these rules, and under basic standards of decency, most newspapers will not publish the names of rape victims. Nor will they publish the names of juvenile offenders, unless charged as adults with crimes so heinous or so public that they become a matter of general interest. But the ethical and legal landscape of privacy can become a minefield for the aggressive reporter.

Item. Once then-powerful House Ways and Means Committee Chairman Wilbur Mills' girl friend, the Argentine Firecracker, dove into the Tidal Basin in the early morning hours, the lid was off a widely known fact in Washington: Wilbur Mills was on the bottle. Prior to that time, although many reporters in the nation's capital knew that Wilbur Mills was drinking too much and was often drunk at nightclubs, not one had written that fact. Nor had any editor pressed to have the story written.

Should the editors have waited until the incident occurred?

Item. When Joan Kennedy was picked up for drunk driving in Virginia, the Washington *Post* placed the story on the first page of the Metro Section of the newspaper. Wilbur Mills' drunken escapades were carried on its front pages on the same day. Was the distinction because the Washington *Post* tilted more toward the Kennedys than toward Wilbur Mills? Or because Joan Kennedy was only the wife of a public figure, whereas Wilbur Mills was a powerful public figure himself? Would the Joan Kennedy story have been on page one of the Washington *Post* if her husband had not withdrawn from the Presidential race? Would those reporters and editors who knew about her drinking problem long before the Virginia arrest have written about it if her husband was an active Presidential candidate?

Coverage of public officials elected or appointed to conduct the people's business is one of the press's highest duties. The question is the extent to which newspapers publish information about their private habits. These, in terms of newsworthiness, are largely those habits related to drinking, mental stability and sex.

In general, the media have been loath to undress even the most public personalities on the pages of their daily newspapers or in the film clips of their television news shows. Journalists know how hard it is to isolate precise facts and are unwilling to publish information not firmly in hand. At Georgetown and Manhattan cocktail and dinner parties, they revel in gossip about the private lives of public figures, particularly with respect to drinking and sex. But publication is another matter.

The general rule most journalists claim to follow is that a public person's private habits merit revelation only when they affect that person's public performance or result in public acts, such as an accident or an arrest. Increasingly, young journalists argue that this is a cop-out. They note that more is printed about the private lives of celebrities than of public officials who have far more power over our lives than movie and television stars.

Drinking habits tend to present the most difficult problem. While preparing for a conference on "The Media and the Law," we met with Professors Charles Nesson, Arthur Miller and Albert Sachs at the Harvard Law School. During that luncheon, editor Simons was pressed as to why newspapers do not publish that

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Howard Simons is managing editor of the Washington Post. *Joseph A. Califano, Jr., who last year was practicing law in Washington, is now Secretary of Health, Education and Welfare. This article is excerpted from* The Media and the Law, *a book jointly edited by the two men.*

Congressman X, House Leader Y or Senate Committee Chairman Z is a chronic alcoholic, or was drunk at a committee meeting, or on the floor of the House or Senate.

Simons rejoined: "How do we know he is drunk? The accurate determination of that condition is by no means simple in a drug-plagued society. Sometimes illness or drug therapy mimics the disease."

"Isn't that just as important to report?" the three law professors probed. "Don't the people have a right to know whether their elected and appointed officials are capable of conducting the public business? In making that determination, isn't it relevant whether they can devote their full mental and physical faculties to that business?"

The questions are well taken. The nation would probably be better off if—to the extent such information can be accurately obtained—more were printed and televised on the problem of alcoholism in the nation's capital, among the nation's elected and appointed public officials.

But alcohol is not the only private problem. What of the private sex lives of public officials? Are they relevant?

Until the recent rise of the gay movement, it was generally considered important public information if government officials with access to classified information were discovered to be homosexual. The argument essentially was that a person could be subject to blackmail by a foreign power. In today's world, if a newspaper discovers a homosexual State or Defense Department official, who has all kinds of special clearances, is that an item worthy of publication?

Walter Jenkins provides a classic kind of privacy-invasion allegation. Jenkins was arrested one night in the YMCA of the District of Columbia in the course of an attempted homosexual engagement in the men's room. The White House tried to eliminate his name from the police blotter. Superlawyers Abe Fortas and Clark Clifford visited Washington newspapers in an attempt to kill the story. Why destroy Walter Jenkins, they argued; the President, Lyndon B. Johnson, will never permit him back in the government, and that takes care of the national-security problem. Nevertheless, the newspapers published the story. Was this a legitimate story to print? Blackmail possibilities were present. Jenkins had access to highly sensitive national-security information as well as detailed knowledge of the operation of the Johnson White House. The clincher in this particular case was the fact of a public incident: Jenkins was arrested.

But suppose there had been no arrest; suppose there was simply an unimpeachable witness to the performance of a private homosexual act. Should the newspapers publish?

Are there other relevant considerations in determining what is private? For example, if a Senator is pressing for special legislation to protect the American family, is the fact that he has been divorced half a dozen times or broken up three or four families relevant? When a woman is campaigning on a pro-right-to-life ticket, should

"A public person's private habits merit revelation only when they affect that person's public performance or result in public acts"

Wilbur Mills joins Argentine stripper Fanne Foxe onstage in Boston

McGovern announces Eagleton's resignation from Democratic ticket, July 1972

the press print the fact that as a 15-year-old minor she had an abortion? If a 60-year-old public official committed a murder in his teens that a reporter has just discovered, should his newspaper reveal it? Suppose it was only manslaughter?

Few of these questions are easily answered. It seems likely they will be decided on a case-by-case basis. What appears increasingly clear is that, from legal and journalistic vantage points, individual rights of privacy are abandoned by public figures once they voluntarily enter political or other public arenas. There is almost no legally protected privacy interest for a U.S. Senator or Congressman, should the press decide to publish. The only protection is the judgment and good taste of most television broadcasters and daily newspapers.

Certainly the wife of a President is a public figure. Even the private aspects of her life have been recognized by the participants themselves to be matters of public interest. The mastectomies of Betty Ford and Happy Rockefeller were major public events, with detailed and intimate briefings about the patient by the doctor. In these situations, the central question in the skeptical minds of the press is whether or not the information is accurate.

Less clear and more difficult is the problem with children of public figures. There is a tendency to hang the children for the fame of their parents. When a young Kennedy or the son of a

SUSPICION ISN'T PROOF

By ALAN L. OTTEN

A good many people feel properly grateful to the press when it exposes some politician's misconduct, such as that of Rep. Wayne Hays. Yet others say, "You reporters know of a dozen politicians who steal, drink or play around. Why don't you tell us about them, too, instead of covering up for them?"

Well, a reporter may know one or two officials who he believes are senile or drink too much or even keep mistresses, but almost certainly he doesn't know of a dozen. Much of the "knowledge" that some reporters boast of having is pure speculation, idle chatter that simply can't be printed except in the scandal sheets, and even there usually quite circumspectly.

Most White House reporters suspected that President John Kennedy was having affairs with a number of women, but few, if any, had specific evidence. Some White House newsmen suspected that Richard Nixon was drinking heavily toward the end of his Presidency, but they didn't have the year that Woodward and Bernstein had to turn up confirming sources. When Rep. Hale Boggs used to make rambling and emotional speeches on the House floor, was he sloshed, on the edge of a breakdown, or just feeling very deeply about the subject under discussion?

The laws of libel aren't particularly the problem here; the courts take a fairly permissive view of statements about public officials. But there's still the matter of journalistic ethics; responsible reporters and editors want to be sure before they publish damaging charges.

During the 1968 campaign, painstaking investigation pretty well convinced *The Wall Street Journal's* Jerry Landauer that GOP Vice Presidential nominee Spiro Agnew had been accepting payments from businessmen while he was executive of Baltimore County and governor of Maryland. Yet Landauer's sources wouldn't be quoted, and both he and his editors agreed that the *Journal* couldn't responsibly print so explosive a story using anonymous charges and innuendo.

Other questions arise. Suppose the reporter can actually prove that a Senator drinks too much or that a Congressman is keeping a mistress; is this something to be printed just because it's a titillating item that would interest readers, or is some additional justification needed for publication?

Most of the press follows the admittedly subjective rule that an official's private hanky-panky must affect the way he performs his official duties before it's to be published. Thus heavy drinking by the President should be reported, because it could affect his ability to make vital decisions. A senile or chronically intoxicated committee chairman should be spotlighted, because this is bound to affect the way the committee does its business. A Congressman who pads his payrolls or expense accounts should be exposed, because he's breaking the law and cheating the public.

Most of this type of misconduct does, in fact, get printed and broadcast when a reporter really does "know" it. The press competes to be first with the news of the official who has taken bribes or illegal campaign contributions. For years, Drew Pearson and now Jack Anderson have reported the drinking problems of key lawmakers. George Wallace's physical health was widely covered. The Senator or Congressman picked up for drunken driving rarely manages to keep that news out of the papers.

Many a reporter who feels he can't make a flat-out charge may still strongly suggest what he considers to be the case. He won't call the Senator a drunkard but simply tell how he slurs his words or stumbles around the Senate floor. He may not say a prominent political figure has a mistress, but simply report how often the two are seen dining together at posh restaurants.

Yet the general press rule remains that even politicians are entitled to have their private misdeeds ignored so long as their official activities aren't suffering. The theory is it's no one's business if a Senator whores around nights, so long as he's alert and on the job in the morning. Some of the heaviest drinkers and most active swingers are among the more effective legislators.

There are those, including quite a few in the press, who quarrel with this general rule. Some say, for example, that persistent heavy drinking is bound to affect performance, no matter how sharp the lawmaker might appear at committee meetings. Others argue that public officials, particularly those in the most important and visible positions, have special responsibility to display high moral standards. And certainly some escapades raise serious doubts about the general character and fitness for office of the persons involved.

The press today, as part of its general post-Watergate fastidiousness, appears more willing to feed the enormous public appetite for titillation. At the same time, standards of morality are changing; citizens now seem ready to accept instances of misconduct that only a few years ago would have guaranteed a politician's defeat at the next election.

In short, as with so many other issues involving the proper role of the press, the questions come far easier than the answers.

Alan L. Otten is a columnist for The Wall Street Journal, *in which this article appeared.*

prominent judge is caught with pot, it is always printable, sometimes front-page news. In a sense, this is unfair. Yet many politicians enthusiastically exploit their families for their own political purposes. If a politician uses his family to further his career and volunteers it to the public, is he not in effect putting his family into the public arena?

The health of public officials is another matter. Most reporters are familiar with the evasions and dissembling that surrounded the final months and years of the Woodrow Wilson and Franklin Roosevelt administrations. Lyndon Johnson, particularly sensitive to this issue because of his heart attack when in the Senate, overwhelmed the press with information about his gallbladder operation, even displaying the scar. Dwight Eisenhower's press secretary, James Haggerty, presented detailed stitch-by-stitch reports on Ike's ileitis operation and a day-by-day account of his heart attack recovery. It is generally accepted that the health of Presidents and Vice Presidents is of special importance; but during the 1972 Presidential campaign, Sen. Thomas Eagleton kept his medical history to himself, attempting to avoid the issue of the past mental health of a Vice President. Once exposed by the press, his medical history raised questions of such importance about potential mental stability under the extraordinary pressure of a possible Presidency (and about precisely what he had or had not disclosed to Democratic Presidential candidate George McGovern) that Eagleton was forced to resign from the Democratic ticket.

Is not the health of other public figures equally important? While it has, on one occasion or another, ordered all manner of citizens and institutions to divest themselves of all kinds of information — including most sensationally in 1974 the President of the United States — the Supreme Court itself is one of the most reclusive institutions in the free world.

On New Year's Eve 1974, Justice William O. Douglas suffered a stroke that disabled him from functioning as a full member of the Court. No information was released on the significance of the stroke. As Washington *Post* reporter John P. MacKenzie put it: "Inquiries about Douglas's health were stonewalled at the Court's press information office."

The Court press officer, Barrett McGurn, even dissembled with the media. When Douglas returned to work from Walter Reed Army Hospital, McGurn said nothing about the paralysis of Douglas's left arm and leg, merely passing the word that "the Justice is using a sling on his left arm which he said he injured in a fall against a wall at the time he became ill."

Pressured by rumors that circulated Washington, Douglas appeared on the bench on March 24 and the following day permitted television cameras to film him talking with some reporters. That meeting itself raised special concern over his ability to return to judicial duty, and caused many to wonder whether his tenure would be ending shortly. However, until his retirement on November 12, the press and the public were provided with surprisingly little information concerning the gravity of his illness.

Was the press trying to intrude on Douglas's privacy? Hardly. It is difficult to see why any Supreme Court Justice— or indeed any federal or state judge— deserves any more privacy than officials in the executive and legislative branches of the government.

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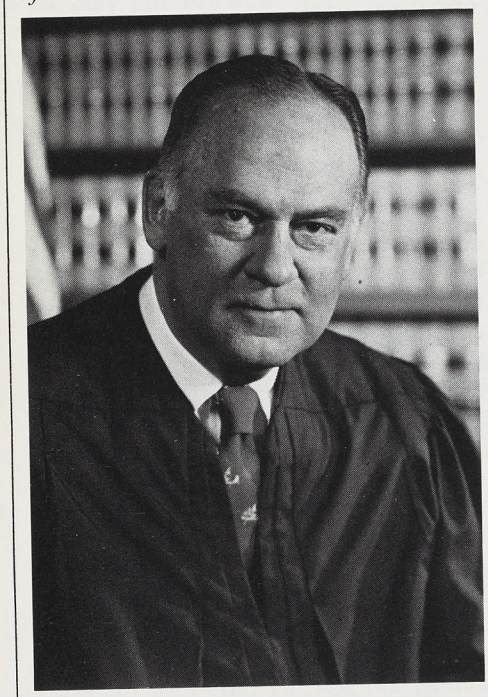
"The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act"

THE PRESS IS FREE TO DO BATTLE

By POTTER STEWART

Associate Justice, Supreme Court of the United States



It was a decade ago, during the Vietnam years, that the people of our country began to become aware of the twin phenomena on a national scale of so-called investigative reporting and an adversary press—that is, a press adversary to the executive branch of the federal government. And only in the two short years that culminated in August 1974 in the resignation of a President did we fully realize the enormous power that an investigative and adversary press can exert.

Public-opinion polls in subsequent months indicated that some Americans firmly believed the former Vice President and former President of the United States were hounded out of office by an arrogant and irresponsible press that had outrageously usurped dictatorial power. And it seemed clear that many more Americans, while appreciating and even applauding the service performed by the press in exposing official wrongdoing at the highest levels, were nonetheless deeply disturbed by what they considered to be the illegitimate power of the organized press in the political structure of our society.

It is my thesis that, on the contrary, the established American press in the decade mentioned, and particularly in the years 1972-74, performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution.

Surprisingly, despite the importance of newspapers in the political and social life of our country, the Supreme Court has not until very recently been called upon to delineate their constitutional role in our structure of government. Our history is filled with struggles over the rights and prerogatives of the press, but these disputes rarely found their way to the Court. The early years of the Republic witnessed controversy over the constitutional validity of the short-lived Alien and Sedition Act; but the controversy never reached the Supreme Court. In the next half century there was nationwide turmoil over the right of the organized press to advocate the then subversive view that slavery should be abolished. In Illinois a publisher was killed for publishing abolitionist views. But none of this history made First Amendment law because the Court had earlier held that the Bill of Rights applied only against the federal government, not against the individual states.

With the passage of the Fourteenth Amendment, the constitutional framework was modified, and by the 1920s the Court had established that the protections of the First Amendment extend against all government—federal, state and local.

The next 50 years witnessed a great outpouring of First Amendment litigation, all of which inspired books and articles beyond number. But, with few exceptions, the focus was on the Constitution's guarantee of free speech—the rights of isolated individuals, or unpopular minority groups, to stand up against governmental power representing an angry or frightened majority. The cases that came to the Court during those years involved the rights of the soapbox orator, the nonconformist pamphleteer, the religious evangelist, seldom the organized press.

In very recent years, cases involving the established press finally have begun to reach the Supreme Court. Thus in a series of cases—*New York Times Co. v. Sullivan* (1964), *Curtis Publishing Co. v. Butts* (1967), *Rosenbloom v. Metromedia, Inc.* (1971)—the Court was called upon to consider the limits imposed by the free-press guarantee upon a state's common or statutory law of libel. As a result of those cases, a public figure cannot successfully sue a publisher for libel unless he can show that the publisher maliciously printed a damaging untruth.

The Court was also called upon to decide whether a newspaper reporter has a First Amendment privilege to refuse to disclose his confidential sources to a grand jury. By a divided vote, the Court in *Branzburg v. Hayes* (1972) found no such privilege to exist in the circumstances of the cases before it.

In another noteworthy case, the Court was asked by the Justice Department to restrain publication by the New York *Times* and other newspapers of the so-called Pentagon Papers. The Court in 1971 declined to do so.

In yet another case, the question to be decided was whether political groups have a First Amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court, in *Columbia Broadcasting System, Inc. v. Democratic National Committee* (1973), held there was no such right of access.

In 1974 the Court confronted a Florida statute that required newspapers to grant a "right of reply" to political candidates they had criticized. The Court, in *Miami Herald Publishing Co. v. Tornillo,* unanimously held this statute to be inconsistent with the guarantees of a free press.

It seems to me the Court's approach to all these cases has uniformly reflected its understanding that the free-press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of *individuals:* freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In

This article is adapted from an address delivered at the 150th anniversary of Yale Law School, in 1974.

contrast, the free-press clause extends protection to an *institution*. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure—but so are we all, because of the free-speech clause. If the free-press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the founders quite clearly recognized the distinction between the two.

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to ensure that a newspaper will serve as a neutral forum for debate, a "marketplace for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee.

In setting up the three branches of the federal government, the founders deliberately created an internally competitive system. As Justice Louis Brandeis once wrote:

> *The [founders'] purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.*

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the government as an additional check on the three official branches. Consider the opening words of the free-press clause of the Massachusetts Constitution, drafted by John Adams:

> *The liberty of the press is essential to the security of the state.*

The relevant metaphor, I think, is the metaphor of the Fourth Estate. What Thomas Carlyle wrote about the British government a century ago has a curiously contemporary ring:

> *Burke said there were Three Estates in Parliament; but, in the reporters' gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times.*

For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American founders decided to risk.

It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.

Consider first the libel cases. Officials within the three governmental branches are, for all practical purposes, immune from libel and slander suits for statements that they make in the line of duty. This immunity, which has both constitutional and common-law origins, aims to ensure bold and vigorous prosecution of the public's business—and the same basic reasoning applies to the press. By contrast, the Court has never suggested that the constitutional right of free *speech* gives an *individual* any immunity from liability for libel or slander.

In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four—or, considering Justice Lewis Powell's concurring opinion, perhaps four and a half to four and a half. But if freedom of the press means simply freedom of speech for reporters, this question of a reporter's asserted right to withhold information would have answered itself. None of us —as individuals—has a "free speech" right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The cases involving the so-called

IN CONSTANT TENSION

The press is in constant tension with community values. Criticism of government may interfere with its orderly functioning—perhaps even its stability and ability to govern. Individual reputation may be damaged and privacy invaded. Judges may be unduly influenced and the impartiality of jurors affected. Moral values may be endangered and public sensibilities offended.

Throughout the history of this country, government has sought in formal and informal ways to control the press in the interest of these community values. Congress enacted the Sedition Act in 1798. Jefferson regarded the licentiousness and lying of the press as constituting a "dangerous state of things," and urged a few state prosecutions as having "a wholesome effect in restoring the integrity of the presses." Lincoln suppressed newspapers and ordered trials of publishers before military commissions. Nixon planned to give the Washington *Post* "damnable, damnable problems" because of its Watergate disclosures. Congress not long ago was considering the initiation of contempt proceedings against a leading journalist for making public a secret committee report. The literature of journalism is full of assertions that freedom of the press is imperiled, if not already destroyed.

The ultimate power of both press and government depends on community opinion—and each has special weapons for influencing that opinion. Yet government in dealing with the press is bounded and controlled by the First Amendment. In 1925 it was determined that the Fourteenth Amendment had, in effect, made the First Amendment applicable to the states. Today, its impact is so pervasive that the story of the press and the law in the United States is largely the story of the development of constitutional doctrine by the Supreme Court of the United States.

—EDWARD L. BARRETT, JR.,
professor of law,
University of California, Davis

"right of access" to the press raised the issue whether the First Amendment allows government, or indeed *requires* government, to regulate the press so as to make it a genuinely fair and open "marketplace for ideas." The Court's answer was "no" to both questions. If a newspaper wants to serve as a neutral marketplace for debate, it is free to do so. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Finally, the Pentagon Papers case involved the line between secrecy and openness in the affairs of government. The question, or at least one question, was whether that line is drawn by the Constitution itself. The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Newspapers, television networks and magazines have sometimes been outrageously abusive, untruthful, arrogant and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance or hypocrisy from government itself.

It is quite possible to conceive of the survival of our Republic without an autonomous press. For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition among the three branches of government, supplemented by vigorous political activity, might be enough.

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral "marketplace of ideas." Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.

Such a constitution is possible; it might work reasonably well. But it is not the Constitution the founders wrote. It is not the Constitution that has carried us through two centuries of national life. Perhaps our liberties might survive without an independent established press. But the founders doubted it, and today in the 1970s I think we can all be thankful for their doubts.

It was Fresno, and they were hauling newsmen to jail by the carload for refusing to back away from a guarantee of anonymity given to a news source

"Go to Jail at 9 A.M."

By JAMES H. BORT, JR.

FRESNO, Sept. 3, 1976—Joe Rosato, the hulking, mustachioed courthouse reporter for the Fresno *Bee*, scrawled his message on the wall of the county-jail holding cell: "Rosato was here—finally."

The graffiti summed it up as well as anything. Twenty months had dragged by while four newsmen from the *Bee*—Rosato and his fellow reporter William K. Patterson, George F. Gruner the managing editor, and myself as city editor—fought to avoid contempt-of-court citations, then to have the sentences overturned. Now we found ourselves at the end of the judicial road, in jail, going through the booking process.

It began in mid-January 1975 when the *Bee* published a series of articles detailing secret grand-jury testimony which had led to the bribery indictments of a city councilman and two others. A few days after the articles appeared, Fresno County Superior Court Judge Denver C. Peckinpah convened an unusual court inquiry, subpoenaing *Bee* reporters and editors to learn how the newspaper got the information. We refused to answer any questions dealing with that aspect, arguing that the confidentiality of our source was protected by the First Amendment, as well as by the California Newsmen's Shield Law. And so the case of the Fresno Four became another confrontation between the press and the courts—one more in a growing list.

There followed the year and a half of court appearances, and appeals reaching up three times to the Supreme Court. Finally, last September 2, word came that once again the Court had refused to consider our petition for a hearing: the battle was over.

George Gruner and I were playing our regular Thursday afternoon round of golf when we got the news. "Petition denied," read the telephoned message delivered to us on the 14th fairway. "Go to jail at 9 a.m."

Gruner immediately blew an easy chip shot and double-bogied the hole.

Rosato got the news while sipping a beer in a local hofbrau. Patterson, just returned from a visit to San Francisco, was told by another *Bee* reporter. I felt little emotion. We had been to the brink so many times while our case went up and down the court ladder that what little emotion there was was relief.

When we reported to the jail downtown the next morning, a large group of news reporters and photographers was on hand to record the event. For, as Roger Tatarian, former editor-in-chief of UPI and now a journalism professor in Fresno, noted later: "This is the biggest gang bust of newsmen in the 200-year history of the United States. Judges in other jurisdictions have occasionally bagged single journalists, but here a single court racked up four at one shot."

No Snitches

News reports described the four of us as grim, and I suppose we were. We were going to jail under a coercive sentence, an indefinite term aimed at forcing us to do the one thing we were determined not to do—answer questions which we felt would lead the court to the source of our information.

We were fingerprinted and photographed. (How many jail mug shots of criminals had the *Bee* printed over the years, I wondered.) Our personal belongings were taken and we were given a cursory medical examination. In the adjacent holding tanks, a score of other prisoners slept fitfully on the hard floor or stared at us with vacant eyes. Then, the booking process completed, a patrol car drove us the 20 miles south to the county industrial farm—a sprawling complex of low-profile buildings, vegetable fields and a herd of some 500 beef cattle.

Lt. Bill Cunningham, big, round-faced, gregarious, was in his usual good humor when we were turned over to him.

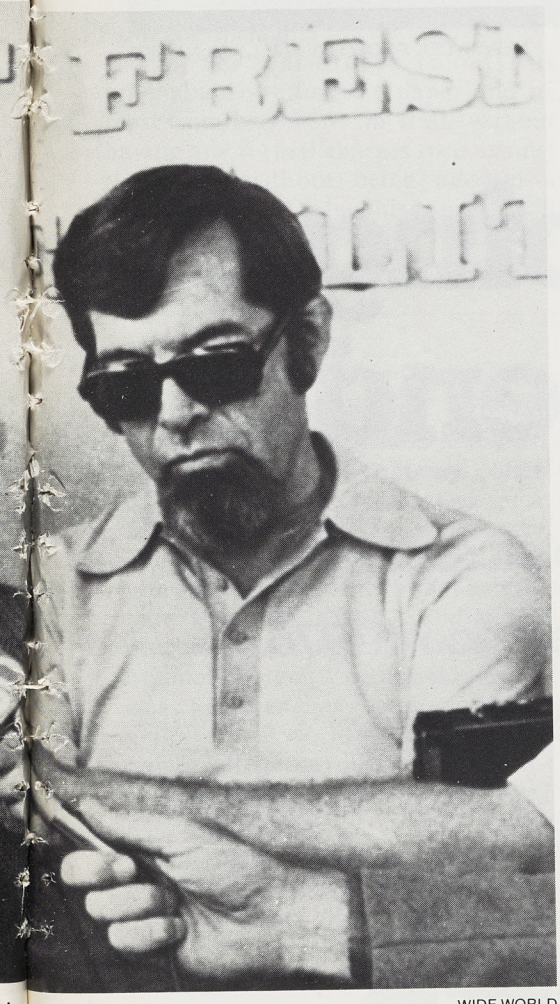
Rosato, Gruner, Patterson and Bort—the Fresno Four—talk to reporters before starting

James H. Bort, Jr., is today ombudsman for the Fresno Bee.

I knew him from years before when I worked as a night reporter covering, among other things, the police beat. It helped to see a familiar face.

The two weeks that followed is a hazy kaleidoscope. There were dozens of telephone calls from newspersons, conferences with our attorneys, the opening and reading of hundreds of letters (mostly applauding our stand), occasional visits from our families, brief exercise periods, and hours of television watching. We watched ourselves and our wives on the screen, and members of a San Francisco church who marched for hours in the rain around the Fresno courthouse to protest our being sent to jail.

We were given uniforms of a sort to wear: ill-fitting white trousers and bright orange sweatshirts with F.C.I.F. stenciled on the back. The four of us shared a room about 10 by 10 feet, with adjoining lavatory and shower, and had access to the camp recreation hall for an hour each morning and afternoon when other prisoners were not using it. (California law decrees that civil prisoners must be separated from those committed for criminal offenses.) In many respects, it was comparable to life in a stateside World War II Army camp.



to serve time WIDE WORLD

While we had little contact with them, the other prisoners' first reaction to us—like ours to them—was one of curiosity. We were celebrities of a sort, the objects of some good-humored banter, and also after a few days, I think, respect. After all, we had refused to reveal our source; in underworld parlance, we were no snitches.

"I've gotta go feed the dogs in case one of you guys tries to escape," a prisoner yelled at us that first day at the farm. One morning a group going out on a 4 a.m. work detail aroused us with shouts of "Wake up, *Bee* Four. It's time to go to work."

A prisoner with some artistic talent drew a cartoon showing the four of us hanging from a rope, with the caption "Hang in there, *Bee* Four." He received permission from the guards to give it to us, and it was published later in the *Bee*.

But if life on the farm really wasn't all that bad, we carried with us constantly the sobering thought that we were locked up, surrounded by barbed wire, our movements and activities under someone else's control. There were many reminders that we were prisoners. Like the first night, when we awakened with a start as the screen door to our small room was pushed open by a guard checking on us.

Perhaps we were not there long enough for the anticipated boredom to set in, but in many respects jail was the easiest part of the *Bee* Four experience. The court appearances and waiting out the appeals created much more anxiety and tension.

The Garbage Connection

Neither I nor reporters Rosato and Patterson can pin down the date when we first obtained the material which triggered our confrontation with Judge Peckinpah. The grand jury had met on the last day in October 1974 to return bribery indictments against City Councilman Marc A. Stefano, land developer Julius Aluisi, and former Planning Commissioner Norman Bains. They were accused of offering an assistant city attorney a bribe in return for a favorable opinion supporting the refund to Aluisi of sewer construction fees. They did not get the opinion they sought—but the City Council eventually did refund more than $11,000, and Stefano allegedly got a $4000 kickback from Aluisi for his help.

Even prior to the grand-jury sessions, much of the evidence had already been leaked to Patterson and Rosato and published in the *Bee* under their bylines. But some of the material the two reporters showed me, after a luncheon meeting in a Chinese restaurant sometime in late November or early December, was new. Stefano, it appeared, had testified to the grand jury that he had accepted a retainer from representatives of a private garbage-collection company to help them get a contract to collect the city's garbage.

Stefano, an attorney, considered the arrangement he negotiated with the firm perfectly proper. "I received a check for $5000 and a promise of $20,000 contingent upon the city's signing the contract," he testified to the jury.

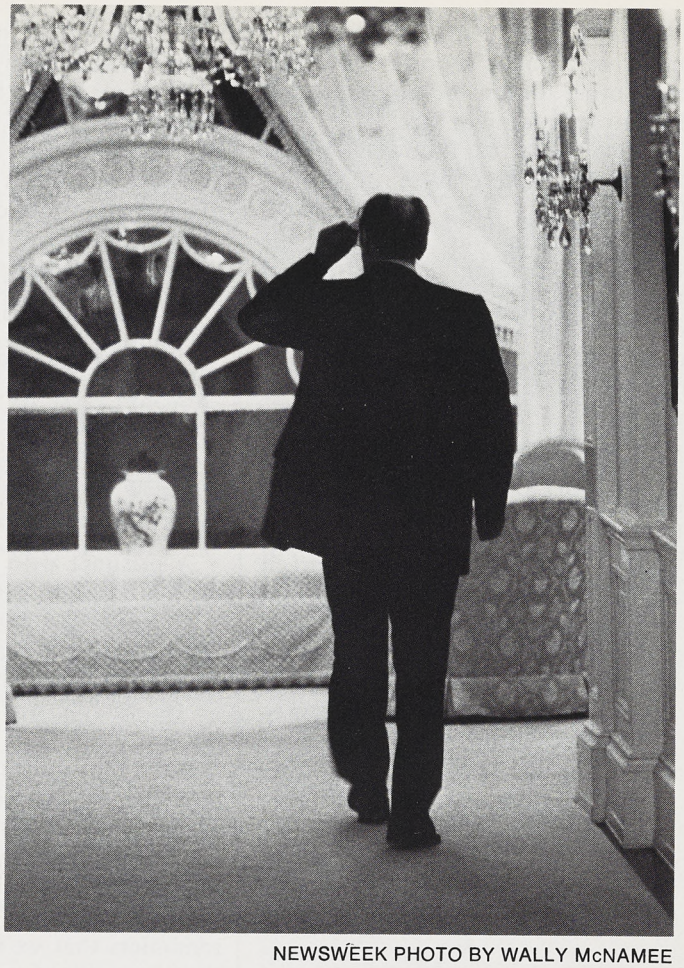
Our best information was that the garbage contract might go before the City Council for consideration soon—within a matter of weeks or days—without Stefano's connection to the garbage company being known. (He didn't make it public, he later testified in open court, because "I didn't know I was supposed to.") It was this transparent conflict of interest which persuaded Gruner and me that the stories must be published, even though the grand-jury transcript had been sealed. Nevertheless, so as not to jeopardize any of the defendants' rights to a fair trial on the bribery charges, we held up publication until changes of venue had been agreed to for both Stefano and Aluisi. (Since the stories contained no new facts about Bains' involvement in the case, they could not prejudice his trial.)

The Sunday the first of the three articles appeared, Judge Peckinpah called Patterson, with whom he had been friendly for years, and asked, in effect, "What are you trying to do to me?" The judge's question was significant, an indication (reinforced many times during the months that followed) that he regarded publication of the stories as a personal affront.

Judge Peckinpah said publicly the next day that while the *Bee* was under no restraints as to publication of the material, he felt he must hold an inquiry to find out how we obtained it. He subpoenaed Patterson, Rosato and Gruner as witnesses and, assuming the *Bee* had a copy of the sealed transcript, ordered Gruner to produce it.

On January 24 and 25, the bribery-case defendants, their attorneys, the district attorney and his aides, the county clerk and the three *Bee* newsmen all testified the information did not come from anyone subject to Judge Peckinpah's

NEWSWEEK PHOTO BY SUSAN T. McELHINNEY



NEWSWEEK PHOTO BY WALLY McNAMEE

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earlier gag order directing all parties in that case not to discuss it. Time after time, the three *Bee* staffers were found in contempt for refusing to answer questions dealing with how the information was obtained. Before the session ended, Patterson and Rosato were ordered to surrender their keys to the courthouse press room (their office) and a second key which Patterson used to gain entrance to the county clerk's office and a hallway leading to the judges' chambers in his activities as a reporter.

Bags All Packed

When the judge reopened the inquiry on February 7, he announced dramatically from the bench that one of Patterson's keys was a master key which could open most doors in the courthouse. Both reporters testified under oath the key had not been used to obtain any information about the grand-jury testimony. But in a quivering voice, his face red with anger, the judge read a prepared statement declaring the keys gave *Bee* personnel "unlimited access to the office of the district attorney, the public defender and the county clerk at any time—weekdays, holidays, the dark hours of the night."

The *Bee's* attorneys found this untenable: in effect the paper and its representatives were on trial, without having any formal charges filed against them and without being allowed a defendant's right to face his accusers, call witnesses or cross-examine the state's witnesses. They were successful in halting the inquiry while they asked higher courts to clarify the rights of "quasi-defendants." But the Fifth District Court of Appeal in Fresno upheld Judge Peckinpah's handling of the case, and the California and United States Supreme Courts refused to hear appeals.

So Judge Peckinpah ordered the three *Bee* witnesses back into court—this time adding my name to the list, since as city editor I was supervisor of the two reporters. As the others had done, I avoided answering any questions which would help the court narrow down the possibilities of who the source was. In his questioning, Max Robinson, the deputy county counsel who represented the judge, never asked any of us directly to identify the source. Ironically, three of us couldn't have done so if we wanted to. We simply didn't know who it was. The source was Rosato's alone and he had promised to keep it confidential.

After conclusion of the hearing in April 1975, we appealed the contempt citations. The appellate court dropped a few, but upheld 55 of the original 73: that is, 18 against Rosato, 17 against Patterson, 5 against Gruner and 15 against me. We were liable for a five-day sentence, a $500 fine, or both, on each count. It amounts to a lot of jail time for sticking to a principle.

Last July 30, after a fruitless round of appeals, we were finally committed to jail. But five hours before we were to report to the sheriff our sentence was stayed again: our attorneys had one more legal argument to make. They asked the courts to find that we were acting on clearly articulated and established moral principle, and should not be jailed for an indefinite time under the coercive-sentencing procedure. (See box this page.) The appellate court denied the petition on August 4, we packed our bags again—then the California Supreme Court issued another stay. But in the end the higher courts refused to grant a hearing.

And so finally it was September 3, and our jail terms began.

Two weeks later, Superior Court Judge Hollis G. Best (Judge Peckinpah had retired) called court into session again. A Fresno psychiatrist told the court he was convinced further coercion would not force us to talk. Columnist Jack Anderson and Los Angeles *Times* Washington bureau chief Jack Nelson both testified that the principle of confidentiality was basic to the news reporting business, and used extensively: a journalistic ethic which simply could not be ignored. The four of us added our own testimony, and as the long day in court drew to a close, we felt confident Judge Best would terminate the coercive sentences.

He did more. He consolidated all the contempt sentences into one five-day sentence for each of us, then gave us credit for the 15 days already spent behind barbed wire.

Judge Best said he was persuaded that "there is an established, articulated moral principle in the news media" and that "there is no substantial likelihood that continued incarceration will accomplish the purpose of the court's order, that is to coerce or compel these gentlemen to answer the questions."

At 6:05 p.m. we were free. A patrol car took us back to the industrial farm for the last time. Our families followed, and after picking up our belongings, we gathered in a downtown restaurant for a victory celebration.

A Powerful Lamp

What, besides our freedom, did we have to celebrate?

First, our source was still intact. The identity was not revealed. It never has been.

Second, the national publicity given our case served to let the public know that when a reporter gives a promise of confidentiality to a news source, he means it.

Third, although our case broke no new legal ground, established no precedents in the law, it has perhaps

The Long-Running Farr Case

In 1971, reporter William T. Farr was sentenced to jail for an indefinite term on charges of civil contempt, after refusing to divulge his sources for a Los Angeles *Herald-Examiner* story relating to the Charles Manson murder trial. He spent 46 days behind bars, then was released pending the outcome of his appeals. Result: the original charges were upheld. It was clear however that coercion was not going to work; so, after a month and a half of jail, it was ruled that the open-end sentence had become punitive, and it was dropped.

Still pending was an additional five-day sentence for criminal contempt, and this Farr was ordered to serve. The Supreme Court last June declined to review the case. Not until December, when a California appeals court ordered the five-day sentence thrown out, was the threat of further jail time finally lifted.

But there is an extra note of irony. The only possible sources for Farr's original story were the Manson case attorneys, all under a court "gag" order. Under questioning by the judge, Farr admitted to getting transcripts from two of them—which ones, he refused to say. Now two of the six lawyers have brought a $24-million libel suit against him, claiming his general admission damaged their professional reputations. So he is still being pressed to answer further questions about his sources.

made the courts more aware of the newsman's ethic and so may help keep other reporters out of jail in the future.

Confidential sources are indispensable to the American free press. Many important stories—Watergate, for example—simply could not be told without utilizing them. A democracy cannot live in darkness, and the press is the most powerful lamp we have to focus on corruption, arrogance and abuse of authority in government. The press's light has also been directed at such other areas as the shadowy activities of organized crime, and corporate abuses. The American press must therefore defend the First Amendment with all its energy, even if it means an occasional jail sentence for a reporter or an editor.

It is my belief, in light of our experience, that legislated protection of the confidential relationship between reporters and their sources is ineffective. California's Newsmen's Shield Law is one of the most liberal in the nation. Developed over some 40 years, it is a clear, strong statement which declares editors and reporters "cannot be adjudged in contempt for refusing to disclose the source of any information procured for publication." Yet twice in recent years—in our case, and Bill Farr's—newsmen have wound up in jail for relying on it. We in the press must hang our hats on the First Amendment.

Tension between courts and press will continue. The *Press Censorship Newsletter,* distributed every couple of months by the Washington-based Reporters Committee for Freedom of the Press, is filled with hundreds of entries on current cases. If the press does not remain alert to the challenge, it will suffer—and so will the American people, who look to the press for the information they need to be active participants in a democracy.

Fortunately, the Fresno Four work for an organization with the will and the resources to help fight the battle. McClatchy Newspapers, which publishes the Fresno *Bee*, never questioned our stand or the tens of thousands of dollars needed to carry the defense. Unfortunately, many news organizations lack the resources to defend themselves in similar circumstances—a fact which might make them back away from stories which could lead them into an expensive confrontation with the courts. That is the chilling aspect of cases such as ours.

There is an epilogue of sorts to the Fresno Four case.

Stefano twice was acquitted of bribery charges and still practices law in Fresno. However, he did not seek re-election to the City Council and has retired from public life. Aluisi was convicted and is serving his term in the Fresno County Jail. Bribery charges against Bains were dropped after he testified against Stefano.

The garbage contract proposal never did get to the City Council, thanks in large part to the *Bee's* disclosures.

And the key, which Judge Peckinpah so dramatically revealed as a master key? Judge Best and County Counsel Robert Wash have both said publicly they are convinced it was not used, and that we did not employ any illegal means to obtain the information upon which the stories were based.

The Fresno Four case is over. My most cherished memento of it is a trophy Gruner gave to each of us: a jail cup, mounted and appropriately inscribed. It has a place of honor in my den.

"It is a little like trying to read the entrails of birds"

LIBEL LAW— THE BYZANTINE SIMPLICITY

By CHRISTOPHER M. LITTLE

Enormous amounts of money are being spent by the media in this country to defend libel suits. It costs thousands of dollars to defend such a suit even when it is thrown out before trial. If the case goes through trial, it may cost scores of thousands—even before possible appeals. And there are cases where the cost undoubtedly runs into the hundreds of thousands of dollars.

Yet a great many suits are instituted which are wrong-headed and have no hope of success to begin with. Why are they brought, then? One reason is that this is an area of the law where emotions or public-relations considerations may be more important to a plaintiff than his lawyer's estimate of his chances in court. A publisher must defend each action as thoroughly as possible because the stakes are so high, not just in money but in reputation.

Another reason for the number of libel suits is that confusion in the law breeds litigation. And makes it more costly as well. Expensive, time-consuming discovery procedures prior to trial, and length of the trial, are greatly affected by the necessity of shooting at what is—in terms of legal standards to be satisfied—a moving target.

The result can be a chilling effect. An example of the impact of the threat of libel suits was this note, in the August 1974 issue of [*MORE*] magazine:

> *As originally written, the accompanying article summarized certain allegations against San Francisco Mayor Joseph Alioto. The view of our lawyers was that we faced the clear threat of a lawsuit if we published any of these allegations. They also said we would likely win such a suit, but that the cost of defending it might easily bankrupt the magazine. After a good deal of agonizing, during which we delayed publication of this issue six days, we decided the risk was not worth it.*

The principal defenses of the press against libel suits in the United States can be stated with seeming simplicity:

- ☐ Truth is an absolute defense.
- ☐ Even if statements printed about a private person are shown to be false and damaging, that person still must prove, depending on the jurisdiction, malice, gross negligence or negligence on the part of the publisher.
- ☐ Moreover, if the person is a public official or public figure, he or she cannot recover damages unless the publisher knew the statement was false, or printed it with reckless disregard for whether it was true or false.

These principles are misleading in two major respects. First, on the meaning of such terms as "negligence" and "public figure," there are almost as many opinions as there are lawyers and judges. And we all know how many opinions there are as to what is "truth."

Second, many lawyers, judges, laymen and even journalists see these principles as sound and adequate protections of the First Amendment rights of a free press. And this perception, I submit, is only partially "true."

Who Is a "Public Figure"?

As noted, confusion in the law breeds litigation. For illustration, one need look no further than the concept of a "public figure" in libel law.

The concept has its roots in the Supreme Court's landmark decision of *New York Times v. Sullivan,* in 1964. An advertisement placed in the *Times* by supporters of the civil-rights movement described actions taken against demonstrators in Montgomery, Ala., by law-enforcement officials. The Montgomery city commissioner responsible inaccuracies of fact in the ad, and an Alabama jury awarded him $500,000 damages. But the Supreme Court held that the man, being a public official, could not recover damages unless he could prove the newspaper acted with "malice"—*i.e.,* that it knew the statements were false, or published them with reckless disregard for their truth. Criticism and discussion of public officials are so fundamental an expression of First Amendment rights, the Court reasoned, that for constitutional reasons they must be given special protection from libel suits.

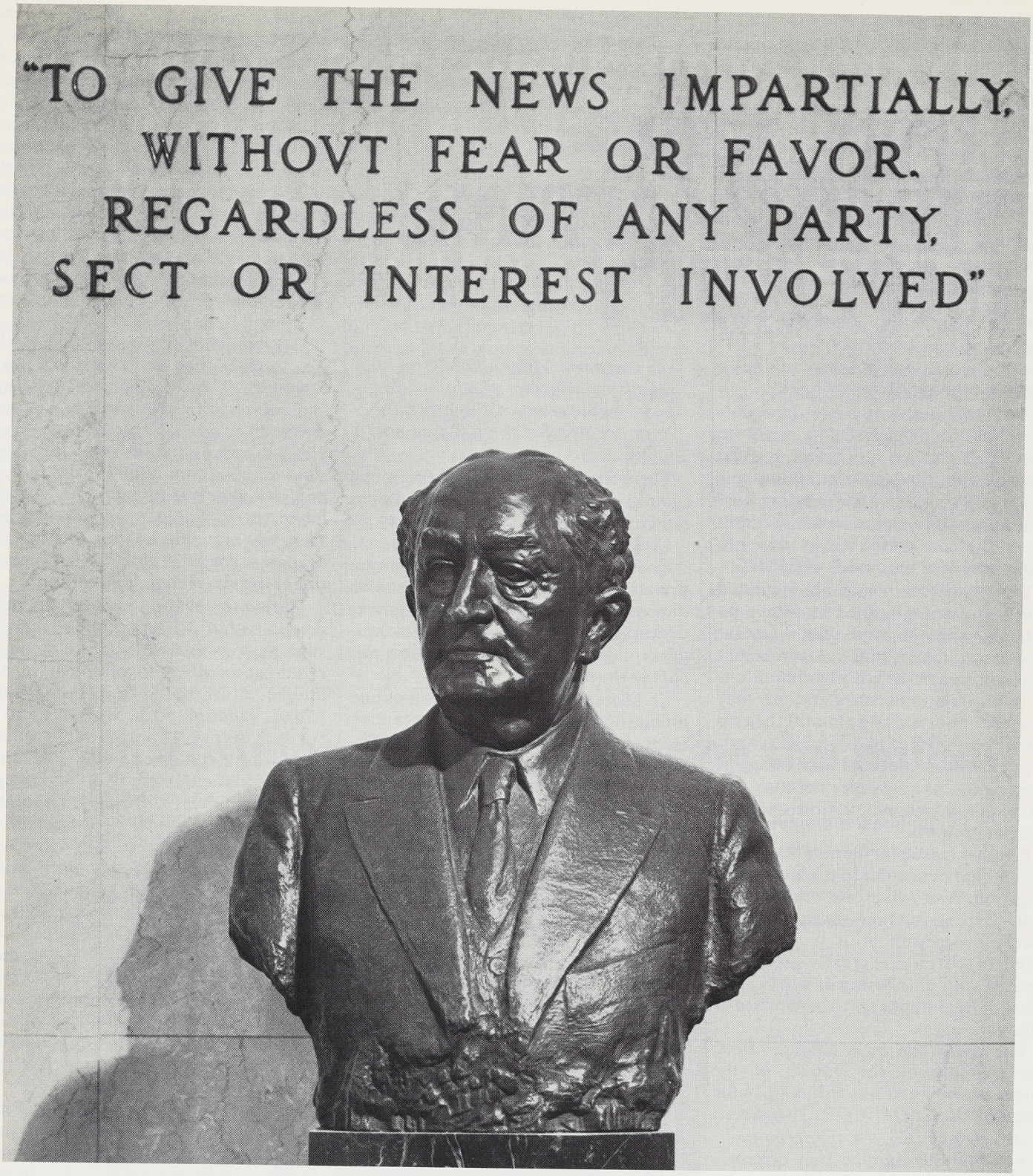
In subsequent Supreme Court decisions, this special protection was extended. If public officials bringing libel suits had to prove malice, so now did "public figures." This extension was almost compelled by the logic of *Times v. Sullivan.* For if free speech and robust debate on matters of public interest are of that great importance, then the principle applies to *all* who become involved in such issues, whether or not they happen to hold office.

During the 1960s, the Court encompassed within the term "public figure" such persons as a well-known football coach accused of involvement in an alleged effort to fix a college game *(Curtis Publishing Co. v. Butts),* and a retired Army general accused of fomenting a riot when James Meredith enrolled at the University of Mississippi *(Associated Press v. Walker).* The high-water mark came with the *Rosenbloom v. Metromedia* decision in 1971. Rosenbloom, a relatively anonymous distributor of nudist magazines in Philadelphia, had been charged with violating an obscenity statute. A radio station reporting the matter said the police had confiscated 3000 "obscene books," and made references to "the smut-literature racket" and "girlie-book peddlers." But the magazine dealer was acquitted of obscenity charges and he sued the station for libel.

Typically, when the case reached the Supreme Court, several different opinions were entered by various Justices. There was not even a majority opinion. However, a plurality (four Justices) concluded that the protection of the malice standard should be extended even to statements about private persons, whenever those statements deal with issues of public or general interest. In short, the test would not be whether it was a "public figure" being discussed but whether it was a "public issue."

Only three years later, in *Gertz v.*

Christopher M. Little is vice president and counsel of the Washington Post.



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Robert Welch, Inc., a majority of the Court rejected this line of reasoning and seemed to retreat from its previous broad definitions of "public figure." A Chicago policeman had been convicted of murder, and the victim's family brought a civil suit against the policeman. The John Birch Sociey magazine *American Opinion* portrayed the family's lawyer, Elmer Gertz, as architect of a "frame-up," and as a "Leninist" and "Communist-fronter." Gertz sued for libel. The federal court of appeals concluded that since the published statements concerned an issue of public or general interest, he would have to prove malice. But the Supreme Court held that Gertz, even though prominent in civic affairs and counsel in a prominent case, for purposes of his libel suit was not a "public figure." The majority opinion said:

> *For the most part, those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those cast as public figures have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved.*

Having backed away to this extent, the Court in March 1976 appeared to retreat even further, in *Time Inc. v. Firestone*. It is to the five separate opinions of the Court in this case that one must now look for what makes a "public figure" and so for the constitutional reach of the malice standard. And it is a little like trying to read the entrails of birds.

Mrs. Firestone, a prominent Palm Beach socialite, was involved in a notorious and widely reported divorce suit. She even held press conferences about it. On conclusion of the case, *Time* ran a small item in its "Milestones" section—an item misstating the technical grounds of the granting of the divorce. Mrs. Firestone sued for libel. The Supreme Court upheld the Florida court's decision that she was not a "public figure," therefore *Time's* misstatement did not enjoy the protection of the malice standard.

Obviously, if media coverage is any indication, the Firestone divorce case was a matter of "general interest." Moreover, the divorce trial was a public proceeding conducted in a public court. Still, at least for the five Justices who signed the majority opinion, marital difficulties—even when part of a highly publicized trial—do not cause the parties to be "public figures."

> "...effective and energetic coverage can be discouraged if the press is legally responsible for the ultimate truth of everything it prints"

Many saw this as a landmark decision, a major restriction of the public-figure doctrine. Yet the majority opinion of the Court seems to maintain that it is nothing more than an interpretation of the basic *Gertz* definition of a public figure. In any event, confusion remains, fueled by the five separate opinions in the *Firestone* case.

What Is "Negligence"?

Although *Gertz* represented a setback for the press with its narrowed definition of "public figure," it did at least establish the principle that the First Amendment precludes state laws recognizing "libel without fault."

Prior to that, when a newspaper published something that turned out to be false and libelous and wasn't protected by the malice standard, many states allowed a plaintiff to recover damages even if the paper could show it had exercised reasonable care in checking out the statement. In *Gertz*, the Court recognized that effective and energetic coverage by a free press can be discouraged if the press is going to be held legally responsible for the ultimate truth of everything it prints. If the public is to have timely reporting, the press cannot be expected to hold back a story until every last detail can be fully "proved." Therefore, the Court held, besides demonstrating the statement is untrue, the private-figure plaintiff must also—at minimum—show that the publisher was negligent and failed to exercise reasonable care. Even beyond that, a state can if it wishes require there be proof of gross negligence, or recklessness—or even knowledge of falsity.

Gertz also established that a plaintiff is required to prove actual damage. And, further, that punitive damages cannot be awarded in a libel suit without a showing of malice. Taken together, these rulings substantially increase the protection of the press. What *Gertz* took away in terms of restricting the public-figure concept, it restored in imposing a more realistic standard for libel suits by private persons.

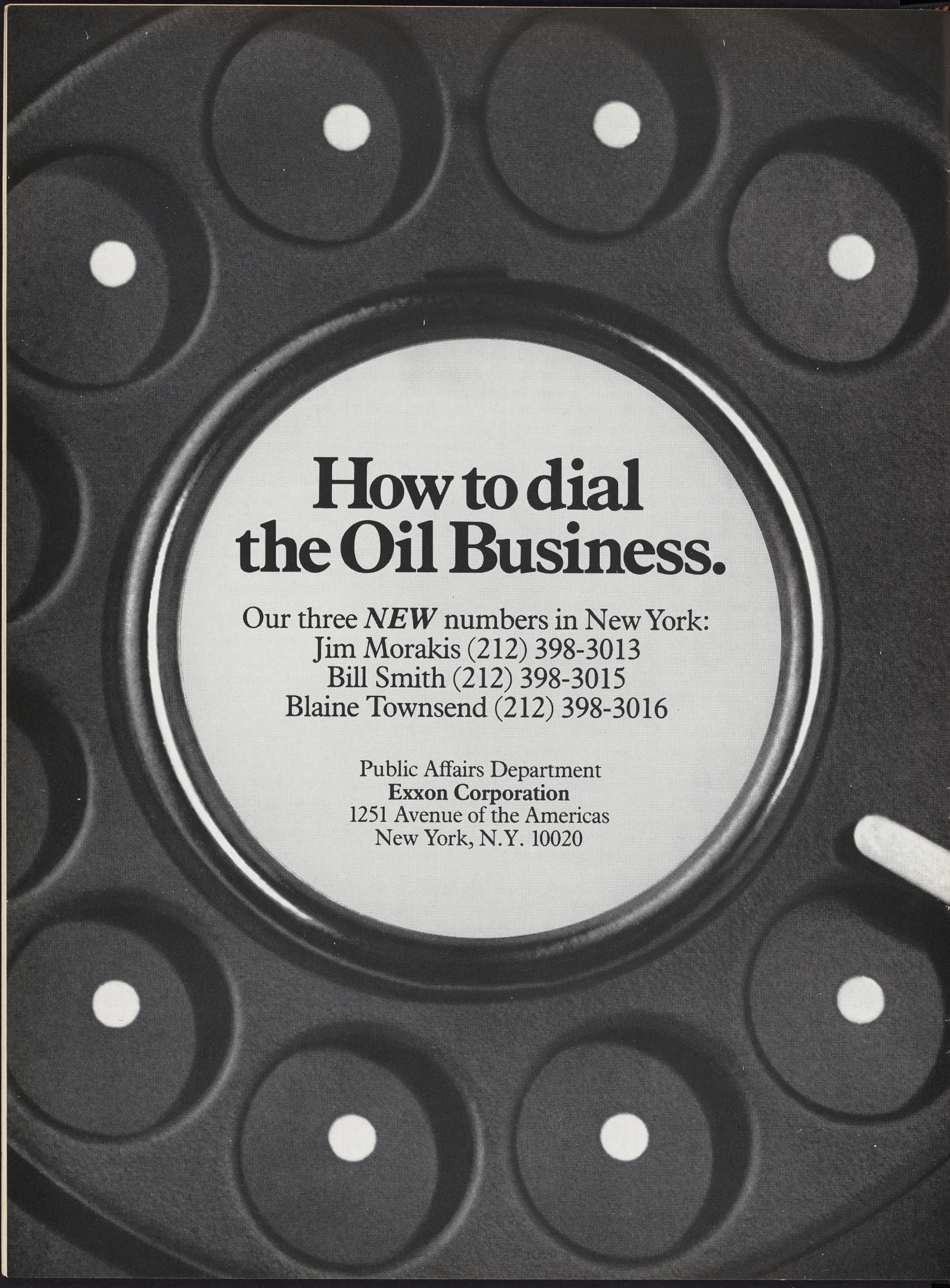
Unfortunately, here too *Firestone* may represent a backward step. The majority of the Court, after holding that Mrs. Firestone was not a public figure, sent the case back to the Florida court to determine whether *Time* was at fault—*i.e.*, negligent—in publishing its "Milestones" item. This action on the part of the Court is disturbing, because the allegedly libelous statement was a rational interpretation of the given facts.

When Mrs. Firestone sued her husband for separate maintenance, he counterclaimed for divorce on grounds of extreme cruelty and adultery. The judge's opinion stated that, according to testimony, "extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl." He then granted the husband's counterclaim for divorce. *Time* reported the divorce had been granted on grounds of extreme cruelty and adultery. What the judge's opinion did not make clear was that—as a technical legal matter—the grounds were apparently "lack of domestication of the parties."

The Supreme Court's disposition of the *Firestone* case, then, amounted to an undercutting of the negligence standard. Indeed, concern over that point is a principal subject of opinions in the case filed by Justices Powell (joined by Stewart), Brennan and Marshall.

The extent to which the negligence standard will protect publishers has also been put into question by the recent decision of the U.S. Court of Appeals of the District of Columbia Circuit in *Ryder v. Time Inc.* In that case, the court suggested that in reporting on a lawyer who was suspended from practice, *Time*—simply because it did not give the man's middle initial—had failed to exercise even a "modicum of care." The court's opinion suggests that another lawyer with the same name but different initial might sue the magazine, successfully, for publishing what admittedly is a true statement. But then, what about a case where a newspaper identifies a person—accurately—as committing a criminal act, and another person with the same name and middle initial sues? The court's opinion does not say.

This is not to suggest that it is possible or desirable for the courts to define "negligence" in private-person libel suits in terms of some detailed formula. General concepts such as negligence are common and useful legal stand-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ards. However, the negligence standard should be articulated in terms that will discourage frivolous suits based on the hope that a sympathetic jury will be able to make a finding of negligence for the slimmest of reasons.

For example, the standard of care to which the press is held could be based on what an ordinarily careful reporter or publisher would do under the circumstances, taking into account such practical problems as deadlines. This at least would put the negligence standard into an appropriate context.

Overprotected? No.

Despite the apparent backward step taken in *Firestone,* many members of the legal profession—and, more important, many judges—feel that the Supreme Court's decisions in *Times v. Sullivan* and subsequent cases have overprotected the press from libel actions. In *Miami Herald Publishing Co. v. Tornillo* in 1974, Justice Byron White, in a concurring opinion, stated:

To me it is a near absurdity to so deprecate individual dignity, as the Court did in Gertz, and leave the people at the complete mercy of the press, at least in this stage of our history... when the press is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

It is my conviction and experience that, to the contrary, confusion over the extent of the public-figure standard and the negligence standard have resulted in entirely too many libel suits, with their potentially chilling effect on a free press. True, the great majority of these are not successful, in large part because of the Court's opinions in *Times v. Sullivan* and *Gertz.* But the very fact that so many suits are brought is itself a serious problem, particularly for publishers who cannot afford lengthy or frequent libel litigation.

We can only hope that in the near future the Supreme Court will, in an appropriate case, establish more clearly just what a "public figure" is, and just what degree of "negligence" a private person has to prove. The lines should be drawn so as to discourage the raft of insubstantial libel suits.

OPINIONS, QUOTES & COMMENT

JUDGE LEARNED HAND:
[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

JUSTICE
WILLIAM J. BRENNAN, JR.:
There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

—*N. Y. Times v. Sullivan (1964)*

ANTHONY LEWIS:
If the press has a favorite quotation, it may be Jefferson's: "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

He made the statement in 1787, when he was American minister in Paris. After he became President he sounded less romantic about the press. In 1802, he found the newspapers filled with "falsehoods, calumnies and audacities." By 1807, toward the end of his second term, he had reached the "melancholy" conclusion that "nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle."

—*Utah Law Review*

CHIEF JUSTICE
WARREN E. BURGER:
A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

—*Miami Herald Publishing Co. v. Tornillo (1974)*

JUDGE MURRAY I. GURFEIN:
A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.

—In the Pentagon Papers case

LENIN:
Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinion calculated to embarrass the government?

JUSTICE HARRY A. BLACKMUN:
A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

—*Southeastern v. Conrad (1975)*

JUSTICE HUGO L. BLACK:
For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

JUDGE DAVID L. BAZELON:
But if we are to go after gnats with a sledgehammer like the Fairness Doctrine, we ought to at least look at what else is smashed beneath our blow.

—Dissenting in *Brandywine-Main Line Radio, Inc., v. FCC (1972)*

JOHN QUINCY ADAMS,
on diplomatic leaks:
The circumstances you mention, proving that your private letters in cypher to the Secretary of State cannot escape the inspection of persons not entitled to them, is provoking. Our government (I'm ashamed to say it, but it is a lamentable truth) has in fact no more retention than a sieve. Everything leaks out, either through treachery or ungovernable curiosity or misplaced confidence. There is not the least safety for a man to tell them anything that he is not willing to have proclaimed upon the housetops. I have complained again and again upon the subject. But I now give up the point, and take it for granted that secrecy is not understood to be a property of good government with us, and mean to act accordingly.

—From a letter when Adams was American minister to Prussia

JUSTICE THURGOOD MARSHALL:
The Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.

—*Stanley v. Georgia (1969)*

THERE IS A WORD FOR A COUNTRY THAT LETS EVERY MAN BECOME ALL THAT HE CAN BECOME.

FREE.

It is almost axiomatic that those who succeed in this society praise the system; those who don't, condemn it. But both miss the main point. Whether or not one succeeds is not the issue. Too many factors enter into the outcome: talent, drive, ability, motivation, perseverance—even luck. The point is: *one has the opportunity.*

The laborer's son can become an engineer. The clerk's daughter can be a biochemist. Blacks can become millionaires, and children of immigrants can become corporation presidents.

Is the system perfect? Far from it. Are there inequities? Too many. But this experiment is only 200 years old; barely a wrinkle on the face of history. The trial-and-error stage. And changes are constantly being made. Too fast for some; not fast enough for others.

Minor changes. Major changes. Drastic changes. Without coups. Without bloodshed. Without exile. Without executions. A startling testimony that for all its faults, the system works. And there is no better proof than our recent history.

Free. That's what it's all about. Free to become all you are capable of becoming. Free to work as many hours a week as you like and to save your dimes and dollars and open your own business. Free to leave the shackles of old traditions and start your own. Yes, even free to coast along at half speed and settle for what you have or get.

Free. That's the ingredient that made our way of life the envy of western civilization. It's what made us scratch in the soil to survive, to grow and prosper.

Free. There is nothing in the world to beat it. And if you have any doubts about it, just look around you. Then look at the rest of the world.

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Obscenity is a spiky issue. There are times when it puts the First Amendment to a severe test and leaves committed liberals uncertain about their principles

HUSTLER— GOING BEYOND LIMITS

By RICHARD NEVILLE

According to Larry Flynt, all he ever wanted to do was "become a millionaire —whether by robbing a bank or by publishing a magazine." Yet almost overnight, the publisher of *Hustler* has become a strange, unlikely symbol in the continuing controversy over freedom of the press. Gruff, paunchy and swaggering, Flynt makes no bones about the purpose of his magazine. "I wanted to talk about sex the way we talked about it on the farm, at the factory and in the Navy," he says. On February 8 in Cincinnati, Flynt was sentenced to 7 to 25 years in jail for "pandering obscenity and engaging in organized crime" (the latter charge flowing from the former as the result of a conspiracy-like statute in state law). Immediately, he became the center of an intense debate in the world of letters and law.

The familiar rules in the obscenity issue had suddenly undergone a subtle but significant change. No longer was it a matter of standing in the dock in support of James Joyce's *Ulysses;* American liberals were now faced with the implications of the First Amendment as a naked principle, rather than having it comfortably clothed in the guise of a work of art.

The unbridled growth of the sex industry in recent years, which has so vividly left its mark on the face of the environment, has also apparently left its mark on the minds of many intellectuals. The result is a moral dilemma, one forced into sharp focus by a petition circulated on behalf of Larry Flynt. Sponsored by an organization called "Americans for a Free Press," which operates out of *Hustler's* Cincinnati office, the advertisement appeared in many newspapers on Sunday, February 20. It was boldly headlined, "Larry Flynt: American Dissident." The text noted President Carter's deep concern for dissident writers and artists in the Soviet Union and urged him "In the wake of recent events to take a closer look at the restrictions of freedom of expression in America itself."

Among the signers were the publishers of five national magazines, as well as writers such as Gay Talese, Gore Vidal, Joseph Heller, Pete Hamill, David Halberstam, Woody Allen and Norman Mailer. The list of 89 included only five women and seemed to be drawn from a recognizable pool of media celebrities—a community of petition signers whose names are readily associated with liberal causes. And yet in this particular case, the list was distinguished by certain exceptions. I spoke to several of those who had declined to lend their names—Lewis Lapham, editor of *Harper's Magazine,* Byron Dobell, editor of *Esquire,* columnists Nat Hentoff and Nora Ephron. Some found it difficult to reconcile their fervent belief in the First Amendment with their revulsion, in the Flynt case, at the consequences of that belief. None could equate the problems of a pornographer from Ohio with the struggles of the Soviet dissidents.

With *Hustler* magazine has the First Amendment finally met its match? Jason Epstein, editor-in-chief of Random House, the first company to publish James Joyce in this country, was not asked to sign Flynt's petition, but would have. "If you are going to have a principle, then you have to take the good with the bad," he said. "Of course, I would rather not even know about things like *Hustler.* I haven't read it, but I can imagine it." Film critic Judith Crist adds: "Civil libertarians cannot march only to the sound of their own drum." A more enthusiastic endorsement was given by *Rolling Stone* editor Jann Wenner: "A guy is being jailed by a law promulgated by the Nixon Court. It's outrageous. Since when has bad taste been a crime?"

But this agreement was rare. *Harper's* editor Lewis Lapham originally signed the advertisement, purchased a copy of the magazine, and promptly withdrew his name. "I am not sure that *Hustler* is what Jefferson had in mind," he remarked. Nora Ephron felt this way: "Most journalists believe in the absolute application of the First Amendment—and then along comes a case like this. For those of us who believe that *Hustler* is a truly obscene magazine, it is a difficult moment. It is one of those cases that make you search for some loophole."

The instigator of the petition, Gay Talese, who has spent the past four years writing a book about sex in America, explained the reasoning behind the ad's text: "I wanted to make those writers who fancy themselves as 'concerned' face up to the connection between the sexual and the political." He derived much of his argument from the case of Wilhelm Reich, the radical sexual theorist who died in prison after defying a court order to prevent distribution of his "orgone boxes." Says Talese, "Suppression of sexuality is entwined with attempts to regulate human behavior through control of imagery. Are we going to give the government the power to become moral policemen?" Talese believes that pornographers like Flynt push forward the possibilities for serious artists. He further argues that many of the adjectives hurled at the dissidents by Soviet authorities are identical to those used against Flynt.

But to Nat Hentoff the connection was not so clear. He withdrew his name when a friend asked him, "Do you know what you're signing?" Hentoff said: "Whoever devised the ad was dumb. The reference to dissidents cheapens a legitimate political issue." Nora Ephron reacted similarly. "As soon as the man from *Hustler* called me and read the petition, I realized there was no way I could sign it. It was absurd. To compare Larry Flynt to Andrei Sakharov is almost the only funny thing I can think of about

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Richard Neville, an Australian journalist, was from 1967 to 1971 publisher of Oz, *a European alternative-culture magazine. He was acquitted on appeal in two obscenity cases, after which British pornography law was modified.*

The New York Times Magazine (March 6, 1977),

Hustler." Gloria Steinem, founder and editor of *Ms.* magazine, elaborates: "Flynt is not a dissident in our culture. He's a pillar of it."

Here Gloria Steinem raises a crucial point. In the Flynt case, the desire for a free press has run smack against many of the enlightened social attitudes of our time. For there is much more to *Hustler* than the indelicacy of its camera angles, and the elimination of the soft-focus approach to photographing genitalia. The magazine exudes a peculiarly virulent kind of woman hatred. On facing pages, it equates the titillation of naked women with bloody accident victims and Nazi symbolism. As Ms. Steinem says: "If a magazine were published with similar attitudes toward blacks or Jews, it would be immediately shut down by public opinion."

In the fight for free expression the tables have been turned in a curious way. In the old days it was an intelligentsia pushing forward new ideas in the wake of ignorant hostility. Nowadays it is this same elite of writers, publishers and opinion makers who are shocked by Larry Flynt's iconoclasm. Perhaps this is due to an unconscious resentment of Flynt's vulgar rapport with millions of Archie Bunkers.

The journey from *Ulysses* to *Hustler* involves more than a move from literature to smut, from words to images. It involves the transition from a preoccupation of an educated minority to the everyday fantasies of the blue-collar majority. *Hustler* was launched by a man without any formal education and with no desire to push a ponderous philosophy. It is a magazine dominated by its readers, one which interacts almost compulsively with their desires.

Once upon a time, obscenity was confined to expensive leather-bound editions available only to gentlemen. When Britain's Penguin Books published the first paperback edition of *Lady Chatterley's Lover* in 1960, its publishers were haled into the dock at Old Bailey. One of the questions asked by the crown prosecutor was: "Would you let your servant read this book?"

Larry Flynt has turned this attitude upside down. Now it is the "servants"—the busboys, the farmers, truck drivers, men on the assembly line—who are on the receiving end of censorship. And their erotic tastes are repulsive to a bewildered literary establishment.

Hustler is the servant's revenge.

"THERE ARE SCREAMING NERVES IN IT"

By HARRIET VAN HORNE

"It's very difficult for anyone to know what comes under the legal definition of obscenity." That's the view of Joel Gora, acting legal director of the American Civil Liberties Union—and social change and case law support his contention.

As individuals, however, some of us feel we know what obscenity is as vividly and precisely as Emily Dickinson knew what poetry was. I'd say that a raunchy magazine called *Hustler* is, by even the loosest definition, obscene.

So depraved, so repellent is the content of *Hustler* that many dedicated civil libertarians—including myself—have decided that Larry Flynt's cause is not worth marching for. By all means, let Flynt out of jail. But enjoin *Hustler* to accept the duty of self-censorship.

Freedom of speech seems to me a secondary issue here. *Hustler* shocks the common decency, degrades women, and presents to young people a thoroughly sick—and frequently cruel—picture of sex. To some of us this looms as the major issue.

Hustler has printed erotic photographs of a woman being ravished by a snake. It has run articles on bestialism, nude photos of a heavily pregnant young woman, a cartoon about Mrs. Gerald Ford's mastectomy.

As a rule, I sign petitions and send small contributions to any *cause célèbre* involving the First Amendment. But in this case when my signature was asked for I discovered that I could not append my name to any document that might give aid and comfort to Larry Flynt. It's not that I love the First Amendment less; it's simply that I despise *Hustler* more.

I am, in a sense, contrite about not signing. The guardians of our purity always begin with a crusade against some scummy semi-literate they regard as politically "dangerous." One ought to take an immediate stand against all such censorship. But to defend Larry Flynt is to defend obscenity of the vilest sort. He makes life difficult for those who are sworn to uphold the First Amendment. His magazine isn't worth fighting for; the First Amendment is. One wishes the two issues were not connected.

"The safeguards of liberty," wrote Justice Felix Frankfurter, "have been forged in controversies involving not very nice people."

In any argument defending Larry Flynt's freedom to publish, the Rosika Schwimmer case must be cited. So often have I quoted Justice Oliver Wendell Holmes' words—"freedom for the thought we hate"—in denouncing textbook censors that I am now astonished to find myself wishing to limit Larry Flynt's free expression.

The Supreme Court has ruled that "obscenity is to be determined by applying contemporary community standards." The community of Cincinnati has found *Hustler* obscene. It troubles me that one community has this sweeping authority. Still, I concur with the Cincinnati jury.

Hard-core pornography is part of the violence of our time. Part of the alienation, the hate, the erosion of family life. There's a lot of smirky sadism in *Hustler*. It stresses the pain, the humiliation of certain sexual activities. Healthy lust, young rough-and-tumble sex seem remote from the editor's mind.

For some unfathomable reason, complimentary copies of *Hustler* have arrived at this desk. Leafing through it, I have often thought of a searing passage in one of J. B. Priestley's essays.

Writing of the new sex-and-violence trend, he observed: "It is not simply coarse, brutal from a want of refinement, but genuinely corrupt, fundamentally unhealthy and evil. It does not suggest the horseplay of exuberant young males. It smells of concentration camps and the basements of the secret police. There are screaming nerves in it. Its father is not an animal maleness but some sort of diseased manhood, perverted and rotten."

No doubt I shall be damned for my "bourgeois Victorian morality" and reminded that *All Quiet on the Western Front* was once banned in Boston. So be it. I still honor the First Amendment, still abhor censorship. But the *Hustler* case has other elements that must be considered along with the issue of free speech.

THE FAIRNESS DOCTRINE

I. TREATED LIKE DISTANT COUSINS

By WILLIAM SMALL

It was almost as if those fine fellows, our Founding Fathers, had sat down with quill pen in hand and Walter Cronkite in mind to frame the First Amendment thus: "Congress shall make no law abridging the freedom of speech, or of the press—except, of course, on radio and television. There, Congress shall feel free to set government standards on fairness in news, bureaucratic definitions on what constitutes a need to reply, and slide-rule obligations on the care and treatment of political candidates."

If they didn't indicate such foresight, the Founding Fathers should be here today to see their political descendants do it for them. Political figures, federal appointees and even Supreme Court Justices rationalize why certain parts of the press can be fully free but some others free only some of the time—partly so, in most cases.

The late Justice Hugo Black felt the First Amendment was absolute: it meant just what it said. The prevailing belief is that this isn't quite so in the case of broadcasting.

There are clichés to defend the bend-the-amendment position. One is that "the airwaves belong to the people." Former Secretary of State Dean Rusk, who has little patience with that one, has observed that the North Star and gravity also "belong to the people."

It has been noted that the government's right to regulate content because it is delivered over publicly owned airwaves means, with equal logic, that the government can regulate newspapers and magazines which are delivered over publicly owned streets or through the publicly owned post office.

Regardless of who owns the airwaves, the more important question is how they are used, and if the government's hand is going to have a grip on that usage.

A definitive ruling on how far the Federal Communications Commission can go in imposing a "fairness doctrine" came in the Supreme Court's *Red Lion* decision of 1969. The Court said, "Just as the government may limit the use of sound-amplifying equipment potentially so noisy it drowns out civilized private speech, so may the government limit the use of broadcast equipment." Agreed. That is exactly what the original legislation of radio was meant to do: control the limited broadcast spectrum so that—as happened in the 1920s—one broadcaster does not infringe on the broadcast channel of the next. It is quite a different thing to extend that concept to the insertion of government into what is being said.

The *Red Lion* ruling also said, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." That, too, is a common argument in favor of a controlled broadcast press. It assumes, somehow, that broadcasters are oblivious or callous toward their viewers.

William S. Paley, the chairman of CBS, noted that "we in broadcasting have no quarrel with fair coverage of news and public issues. We insisted on it, and lived by it, as the record shows, before the Fairness Doctrine came into being. What we object to is setting up the government as the arbiter of the fairness of our coverage—usurping the function of those directly responsible for news and public-affairs broadcasts."

"Fairness" has such a marvelous ring. How can one oppose it? Paley, however, called it a "misnomer" and "an open defiance of the First Amendment. We all would be outraged if the government were allowed to impose standards of fairness on newspapers or magazines. Yet, under the Fairness Doctrine, we are enduring a situation where government, through an administrative agency, can impose such standards on broadcast journalism. Thus, we find full First Amendment protection denied to the very media—radio and television—that have become the primary source of news and information for the American public."

The irony is that broadcasters can fulfill the Fairness Doctrine by tucking away an interview or a contrary viewpoint somewhere in the schedule. NBC found the FCC insisting that it do so after it produced a documentary called "Pensions: The Broken Promise" in September 1972. On the same day that "Pensions" won a Peabody Award as "a shining example of constructive and superlative investigative reporting," the FCC ruled that it should have presented more material on sound, reliable pension plans. NBC could have had someone on the "Today" show or elsewhere to placate the bureaucrats. Instead, it went to court to fight the ruling.

Up through the courts it went. The FCC was reversed, and ultimately the Supreme Court rejected a request to review. Julian Goodman, chairman of NBC, two and a half tedious years later, noted that "over those months, as NBC's legal expenses mounted and lawyers' time burned away, there were those who said, 'Why don't you give them five minutes and talk about good pension plans and get rid of it? What can it cost?' I suspect that Samuel Adams in 1773 heard someone say, 'Come on, Sam. Pay the tax on the tea. What difference does a few dollars make?' The cost, quite simply, is our freedom. It *is* easier to give in. But it is not in the public interest."

There, you have the most damaging impact of government in the newsroom—the so-called chilling effect of the Fairness Doctrine. Richard Salant, president of CBS News, once observed that FCC inquiries result in reporters, producers, executives stopping and spending days "to dig out stuff and try to reconstruct why they did what they did." You don't have to do that often before your enthusiasm for taking on controversy slows down.

The Supreme Court did not find this persuasive. Instead, wrote P.M. Schenkkan in the *Texas Law Review*, "The Court (in *Red Lion*) approved an

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William Small is senior vice president and director of news for CBS, New York.

From a special issue of The QUILL devoted to the First Amendment and published by the Society of Professional Journalists, Sigma Delta Chi,

U.S. Steel is more than steel...

Sure, we make steel. Steel for the industries that help make the United States the most productive country in the world. Steel for Construction. Packaging. Agriculture. Steel for energy-related industries. For the automotive industry. For the appliance industry.

But we also make chemicals. Chemicals for industrial use. Chemicals for plastics. Chemicals for fertilizers.

And we produce raw materials necessary for basic industry. Coal. U.S. Steel is the sixth biggest coal producer in the country. Iron ore. We produce a special ore pellet that maximizes the use of vital iron ore. And we make cement.

Our research facilities are used for more than steel research. They have been involved in programs in the health and medical fields, in addition to being used by scientists in numerous projects.

The expertise of U.S. Steel's engineers and consultants is used throughout the world to help solve special problems.

Above all, U.S. Steel is people—175,000 people working together to provide products and services that help make this country work. And our family includes 77,000 pensioners who have given their working lives to the company.

Yes, U.S. Steel is more than steel. If you would like to discuss any of our many involvements, call our Public Affairs Office in New York (212) 826-8464; Birmingham (205) 783-2377; Chicago (312) 329-2200; Pittsburgh (412) 433-6911; or San Francisco (415) 781-2500.

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entire system of broadcasting upon a mere hypothesis of public injury, and dismissed the possible chilling effect as mere speculation."

There are those who argue that the government imposition of "fairness" means many voices will be heard. Others contend that not more voices but fewer will be heard, and those opinions will be bland and safe.

Americans don't lack exposure to ideas if they seek them out. One estimate is that the average American probably has access to at least eight radio stations, two newspapers, all the magazines he can afford, and six or seven television channels. The danger in the information flow is not the scarcity of voices but hearing some who have nothing to say.

If all of this has the ring of a broadcast journalist who is sick and tired of intrusions into the daily work of editorial judgments by the need to worry about and respond to the specter of the bureaucrat in the newsroom, it is just that. Let editors edit, reporters report. The public will, as it should, be the proper judge.

In the political arena, the equal-time provisions of Section 315 create similar problems. It's difficult to set up debates between candidates, because it can mean giving time—lots of it—to minor figures, even eccentrics, also in the race. You can't do documentaries involving candidates except when they are incidental to the main subject, which, therefore, can't be "them."

Broadcasters have found few sympathizers to their problems. One came, unsolicited, in October 1975 when the chairman of the Federal Trade Commission, Lewis A. Engman, gave an eloquent speech to the UCLA law school on the Fairness Doctrine. "Recall," he said, "that the 18th-century philosophical underpinning for the First Amendment was that no one had the right to control the speech of anyone else. Freedom to express one's opinion was deemed an unalienable right which could not be abrogated by government.

"The fashionable mid-20th-century explanation that the First Amendment is a legal expression of our conviction that if everyone were allowed to speak his mind, the truth would somehow emerge, may be correct. But it was not the reason the First Amendment was adopted.

"It is crucial that this be understood. For, to suggest that freedom of speech is merely a privilege granted by the government in the belief that it will lead to truth—which some have done in embracing the Fairness Doctrine—is to suggest that freedom of speech is no more than a political expedient. Government might as easily decide that uninhibited speech is a nuisance, resulting in rumor, lies and self-serving half-truths; that it is not, therefore, in the public interest. More than a few governments around the world have reached precisely that conclusion."

Broadcasters have tried again and again to show that they belong under the full protection of the First Amendment. Few hear them. In the case of *CBS v. the Democratic National Committee,* Justice William Douglas was one of the few. He wrote: "My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications."

Said Douglas, "One hard and fast principle which it announces is that government should keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it...."

II. A CASE FOR ACCESS

By HERBERT SCHMERTZ

"To avoid controversy on major issues is sometimes to avoid disfavor. But also to avoid distinction."

—FRANK STANTON,
former president, CBS

"...it is the general policy of CBS to sell time only for the promotion of goods and services, and not for the presentation of points of view on controversial issues of public importance."

—ELEANOR S. APPLEWHAITE,
assistant general attorney, CBS

"For God's sake, let us freely hear both sides." —THOMAS JEFFERSON

The television networks, if they think about it, should find it difficult to reconcile their desire for protection under the First Amendment with their practice of refusing to accord the same First Amendment privilege to others who disagree with them.

Herbert Schmertz is vice president for public affairs, Mobil Oil Corp.

There is a strange ambivalence in their position. On the one hand, the networks strongly assert that the Fairness Doctrine, which requires broadcasters to provide a balanced presentation of controversial public issues, impinges on their freedom. Yet, when it suits their purpose, they will hide behind the same doctrine and use it to prevent anyone from buying advertising time to correct errors and distortions made in television's news programs, or to put forward points of view on issues not adequately aired by newscasters. If they allowed such advertising (as newspapers do), say the networks, it would put presentation of news out of balance. Their solution: simply allow no advertising on public issues they consider controversial.

To a very large degree, most Americans get their news and opinions from television. Unfortunately, this means that on certain critical issues, such as energy, in which TV news commentators have offered wrong judgments, the network audiences are left with no meaningful way to learn the issue has other sides.

One has to wonder why they call it a "fairness" doctrine.

- Is it fair, for example, for the American public to be misinformed and misled—intentionally or not—about the causes underlying the energy crisis? We all remember the buzz-words rampant on TV during the 1973-74 embargo—"conspiracy," "rip-off," "exorbitant profits," even allusions to phantom tankers lurking offshore. But who remembers the oil-industry rebuttals, which TV newscasters largely ignored?
- Is it fair for the oil industry to be denied the opportunity to tell its side of the story over the same airwaves?
- Is it fair for groups with unpopular views, or with visually unexciting stories, to be denied the opportunity to respond to criticism?

Perhaps if we more properly referred to it as the "access" doctrine, that would clear much of the emotion from the issue. Access, after all, was the guiding principle behind the doctrine's adoption in the first place—Congress rightly recognizing the airwaves are a scarce public resource to be allocated among potential and competing users.

And a desire that broadcasters not use their privileged position to mold public

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The best ideas are the ideas that help people. ITT

opinion to their own views was what prompted the Supreme Court to decide in the historic *Red Lion* case:

> *It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance the monopolization of that market.... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here...*

Arguing against the idea of "scarce public resource," television spokesmen reply that there are some 8760 broadcast stations, compared with 1733 English-language daily newspapers. True enough. But more than 7800 of those broadcasters are radio stations—whose news programs can hardly compare in audience impact with television. Much more important is the fact that daily newspapers outnumber TV stations almost two to one. And there are only *three* major TV networks.

It is these networks which exercise the most blatant control over access. Mobil has tried, on more than one occasion, to purchase air time to respond to inaccurate or misleading comments on television programs or newscasts dealing with the energy crisis. When it became clear that the networks might be worried about having to provide free time under the law for a rebuttal of Mobil's views, the company offered to pay for any such required time—and the networks could even pick the person or groups to do the rebuttal. We were turned down, consistently.

The energy crisis caught newsmen unaware and uninformed on a highly complex issue. Many newspapers at least expanded energy coverage and developed experts in an attempt to keep the public informed. But TV network news shows stayed with their usual formats. They cover 10 or 12 major stories, plus other "headlines," and essays by a commentator—all between commercial breaks—and, as a result, cover nothing in great depth.

Although he was not specifically talking about energy, Walter Cronkite addressed himself to this problem when, at the Radio and Television News Directors convention last December, he commented on "the inadvertent and perhaps inevitable *distortion* that results through the hypercompression we all are forced to exert to fit one hundred pounds of news into the one-pound sack we are given to fill each night."

There were, of course, "energy specials," prepared by television journalists. One—by ABC—caused Mobil to complain to the Grievance Committee of the National News Council. Although some questions were too complex for the watchdog Council to resolve, it decided without a hearing that ABC "could, and did, select certain facts that pointed in one direction and omit others that pointed elsewhere." The network, the Council said, was guilty of leading the viewers to assume that the program was "striving conscientiously for balance and fairness." In cultivating that impression, "ABC was professing adherence to a standard higher than was required of it, and higher than it in fact achieved."

Edith Efron, whose "News Watch" column appears in *TV Guide,* recently struck out at television's reporting of the shortages of 1973-74. The networks, she says, "paid no attention to the analyses. The truth, they thought, was obvious: the oil and gas shortages were 'unreal'; the cause was an oil-company 'conspiracy'; and the cure was to hack the oil companies to pieces. That, says J. K. Galbraith, is the 'sophisticated liberal position.' It is so 'sophisticated' it rendered newsmen incapable of grasping that America was teetering on the edge of an energy catastrophe caused by government regulation."

Ms. Efron concluded that the energy coverage of the network news departments "is, in fact, a striking illustration of the practical damage that can be caused by reporters with ideological blinders and an apparently inexhaustible capacity for joining destructive crusades."

This is not meant to indicate that we consider television newsmen or network executives to be biased. Even if they were, bias is not the real problem; access is. Newspapers also have their biases, and the Supreme Court has said they're entitled to them. But newspapers do provide access to readers—through letters to the editor, articles by freelancers, and paid advertisements. It's not ideal, but it exposes readers to more than an insular view of important affairs.

Television news, on the other hand, by its very structure does not present complex issues adequately. And by failing to present the widest spectrum of opinions and facts, it denies people the tools to decide important issues. It then compounds its errors by refusing advertisers the right to respond.

Glib arguments to the effect that there are plentiful sources of information if the public wants to seek them out should not be offered as a rationale for television's failure to perform its informational function. Skywriting is passé; graffiti largely illegal; and newspapers simply do not have the same impact.

Television *is* unique. Through a network news program, misinformation can be passed to more people in the twinkling of an eye than the average daily newspaper could reach in a month of Sundays. And though it may forever remain a mystery why, television's believability ratio is twice that of newspapers.

Some system whereby the public's right to know would remain paramount does therefore seem desirable. In the *Michigan Law Review,* Lee C. Bollinger, Jr., makes a case for imposing access regulation on television while maintaining the print media unfettered. "By permitting different treatment of the two institutions," he says, "the Court can facilitate realization of two distinct constitutional values, both of which ought to be fostered: access, in a highly concentrated press, and minimal governmental intervention."

While he grants that access regulation can be dangerous, he notes that the costs and risks can be held at an acceptable level so long as another major branch of the press (newspapers) remains free. "Or, put another way, *only* under such a system can we afford to allow the degree of governmental regulation that is necessary to realize the objectives of public access. The unregulated sector provides an effective check... the benchmark against which the reform must continually be measured... a built-in restraint against excesses in regulation."

As for arguments of a "chilling effect" on television's ability to handle controversial issues, Bollinger notes, correctly, that: "The publication of news in the unregulated press serves as a competitive prod to the regulated press to publish what it might otherwise omit."

With such a partial regulatory system, Bollinger says, "Neither side of the access controversy emerges victorious. The Court has imposed a compromise—based not on notions of expediency, but on a reasoned, and principled, accommodation of competing First Amendment values."

And that, after all, is what the argument is all about. The broadcasters should not have total control, any more than anyone else, over what Americans can see and hear about controversial subjects.

Measure your judgments against those of a top group of jurists and journalists, in dealing with a hypothetical case that involves the press, the law and the national security

HOW WOULD YOU HANDLE IT?

For two years, the Ford Foundation—in partnership with leading newspapers—has been holding a remarkable series of weekend conferences on "The Media and the Law." Journalists, judges, lawyers and government executives confront each other, in group sessions, to test their differing views on just how the First Amendment applies in practice. To focus discussion, participants work their way through cases built of elements similar to those that have raised troublesome issues in real life.

One of the most provocative of all seminars to date was the first. It was co-sponsored by the Washington *Post* and came at a time when arguments over the newsman's role raged with particular force, fed by memories of the Vietnam war, the Pentagon Papers, Watergate and criticisms of an "adversary press." Hypothetical Case No. 1 at this March 1975 meeting had to do with news coverage of matters involving the national security. To ensure a no-holds-barred dialogue, anonymity was promised in regard to views expressed. Participants, with their credentials at the time, are listed on page 41.

The Case

Harlow Mason is an investigative reporter for the Federal City *News*. He has come into possession of two documents which he considers highly newsworthy. One is a chapter of an unfinished personal memoir written by Winston Bridges, former director of the CIA (1963-73), now U.S. ambassador to Hinterland. A typewritten legend at the top of each page states: "Not to be published until ten years after my death or A.D. 2000, whichever is later—WKB." The second document is a memorandum to Bridges from Brian McKinley, director of Counter Intelligence, dated June 17, 1967. It is classified TOP SECRET/LORDS/Group I.

In the memoir, Bridges describes how in the summer of 1967 a key U.S. agent, deeply infiltrated into the Hungarian government, passed on certain information. The agent (code-named Duke) reported a series of contacts between leaders of the antiwar movement in the United States and agents of the Soviet government, and described the movement of funds from Soviet-connected sources to front groups and persons in Sweden, thence to individual American citizens who made contributions to antiwar groups. Bridges states that initially he was too skeptical of the information to act on it. But McKinley, his director of Counter Intelligence, submitted a highly classified memorandum outlining the development of Duke as a spy, detailing every past contact he'd had with Agency personnel, evaluating all information he'd passed before, and stating that he was the most important and reliable source in the entire Lords spy network. (This report is the second document obtained by Mason.)

Bridges, according to his memoir, was sufficiently convinced to initiate a limited program of domestic surveillance to attempt further verification. Such surveillance, according to the memoir, confirmed that the Soviet Union was indeed actively supporting the antiwar movement; Duke's information had been accurate. Duke, according to the memoir, continued to rise in the Hungarian government and to supply increasingly vital intelligence on communist military, political and economic activities.

Mason has prepared a story. He wants the paper to run it and to print the memoir and the Lords report in full.

Questions

1. How should the managing editor of the Federal City *News* deal with Mason's story?

2. Should it make a difference to him how Mason obtained the documents?

a. Suppose Bridges had previously reported that his home in Hinterland had been burglarized and some drafts of his memoirs stolen.

b. Suppose the documents had been copied by a secretary in the State Department, then passed to Mason in exchange for $2000.

c. Suppose Mason, while at a cocktail party in Washington for Bridges, wandered into the study, saw Bridges' briefcase, opened it, glanced through the papers and then, not having time to absorb their contents, stole them.

3. Suppose the CIA and Bridges learn the *News* has the documents. How should the paper respond to a demand for return of the documents on the ground they are stolen property?

4. Should the paper hold back all or part of the story, based on the CIA's off-the-record representation that publication would blow an extremely high-level existing network of spies, and result in at least some agents being killed?

5. Suppose the Agency and Bridges file papers before Federal Judge Keptman to enjoin publication, claiming:

a. irreparable damage to national security;

b. violation of contracts signed by Bridges that he would never publish anything relating to Agency work without first submitting the manuscript to a security clearance;

c. copyright violation.

How should Judge Keptman respond?

6. Suppose the Agency submits an affidavit stating: (a) disclosure of the memoir and the Lords document would reveal the identity of a top CIA spy who is currently minister of finance in Hungary, and as many as 22 other agents currently operating in communist countries; (b) it is impossible to extricate these agents (and their families) from positions of personal danger in less than three weeks; (c) destruction of this spy network would irreparably damage U.S. intelligence capacity, hence national defense; and (d) the information is so sensitive that no more can be disclosed, even to the judge.

7. Should Judge Keptman take any steps to ensure that the process of the court is not being manipulated by the CIA in order to give credibility to a planted, self-serving news story?

Proceedings

PROF. CHARLES NESSON (Harvard Law School): Editor, how would you

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decide this case? A reporter comes in one morning and puts this story in front of you. What do you say to him?

1st EDITOR: The first thing I'd do is ask him very forcefully and very carefully how the hell he got this document. Because there's a smell that he didn't get it properly.

NESSON: And you don't like smells?

1st EDITOR: I don't like impropriety. I don't mind smells. (Laughter)

NESSON: Okay. (Turns to a reporter) Do you tell him where you got it?

1st REPORTER: Yes. I would not have stolen it. I would only have acquired it as it comes to me. Probably I would have written a story that put me in contact with the source, something like that. And he probably would have got the document to me through a third party.

NESSON: Do you ask him where he got the documents?

1st REPORTER: No, I don't. If I knew in advance there had been a burglary report, I'd probably ask. But if he says he's not interested in telling me, that's not enough reason for me not to accept them.

NESSON: Now it looks good. You asked him the question. You did your duty. (Turns to the 1st Editor) How about that, is that good enough for you? He tells you he did not steal it. You take your reporter's word for it?

1st EDITOR: Yes. I examine it. They've got to convince me—which isn't as hard as it sounds. But then we go through and explore the story, point by point, explore each part of the background. I doubt if the reporter's only source is this. He will have talked to people in the antiwar movement, and to other agencies of government. In this kind of story there is a spectrum of public knowledge: people who will gladly give you information, provided it's true, that will tend to confirm this story.

NESSON: Let's just suppose for a minute, Mr. Editor, that the reporter said to you, "I stole the document."

1st EDITOR: That's the end of it. I wouldn't print it, even though it's hot news. Because it's stolen.

NESSON: Does it make a difference that somebody stole it and gave it to your reporter, instead of the reporter stealing it himself?

1st EDITOR: Yes, I'm afraid it does. What sort of difference? Well, along about this time I'd call my lawyer. (Laughter) But, yeah, a reporter can't steal papers. We have to get out information legally, barring some major—

1st TV REPORTER:—news developments. (Laughter)

> "A certain amount of larceny goes on in the news business all the time. The question is what degree"

NESSON: Take an actual case, a big national-security news story. Suppose somebody had stolen the Pentagon Papers. Suppose your reporter had stolen them.

1st EDITOR: I would not have printed them.

2nd EDITOR: There might be another way to find out.

NESSON: I'm talking about documents, the text. Somebody comes to you and they've got a document and it's stamped top secret, Lords/Group I. You're going to get that document some other way?

2nd EDITOR: One could begin to ask questions to see whether the information contained therein existed in some other way.

NESSON: Let me put it to you all. Do we have an editor in the room who would print a story that was stolen by his reporter?

2nd REPORTER: Under some circumstances I would print a story about a stolen document, stolen by my reporter. Particularly with respect to government documents, it's a question in my mind whether unauthorized possession can ever constitute theft. It's different, I should think, from the manuscript we're talking about—this man's intellectual property.

1st TV REPORTER: I think there's a point, a shading of a point, that's being missed here—and since I'm not an editor, I don't have to be hypocritical. A certain amount of larceny goes on in the news business all the time. The question is what degree. Is it stealing to read something upside down on a person's desk? If there is such a thing as stealing ideas or words, hasn't that already begun to happen—and what reporter or former reporter here hasn't done that, or tried? You get a document you know is stolen and you say, "We can't be in the position of using a stolen document. Very bad for us if it was found out. Get it back there—after we've made a copy." Now, can we get another copy of it somewhere more legitimately? If not, can we develop an original story which we can say comes from other sources? The question of whether you use a document or don't is in most cases too simple. You try to find a way in which you do and at the same time do not use the document.

NESSON: You figure out a way so you're not exposed to charges. Purely pragmatic. I mean, you just operate with the information?

1st TV REPORTER: That's a blunt way of putting it.

3rd REPORTER: I think that's wrong. I would hope we don't have this kind of intrepid reporter working for us.

2nd REPORTER: People are sliding off the point. Theft means the unauthorized possession of something in which someone else has a possessory interest. I don't know that any government official has a demonstrable or even an arguable possessory interest in the contents of public documents that belong, I think, to some kind of mass known as the public. And the public, therefore, has some reasonable access to it... so our reporter wasn't stealing the document, because the source from which he filched it didn't own it.

NESSON: The highly classified Lords document, then... you would say fine, no problem with that. But there is a big problem with the other document?

2nd REPORTER: Not a large problem because I think it's derivatively public. The memoir derives solely from the man's public service and experience. I have some problem with the intellectual commercial property right that he will assert, or has asserted, in his memoir.

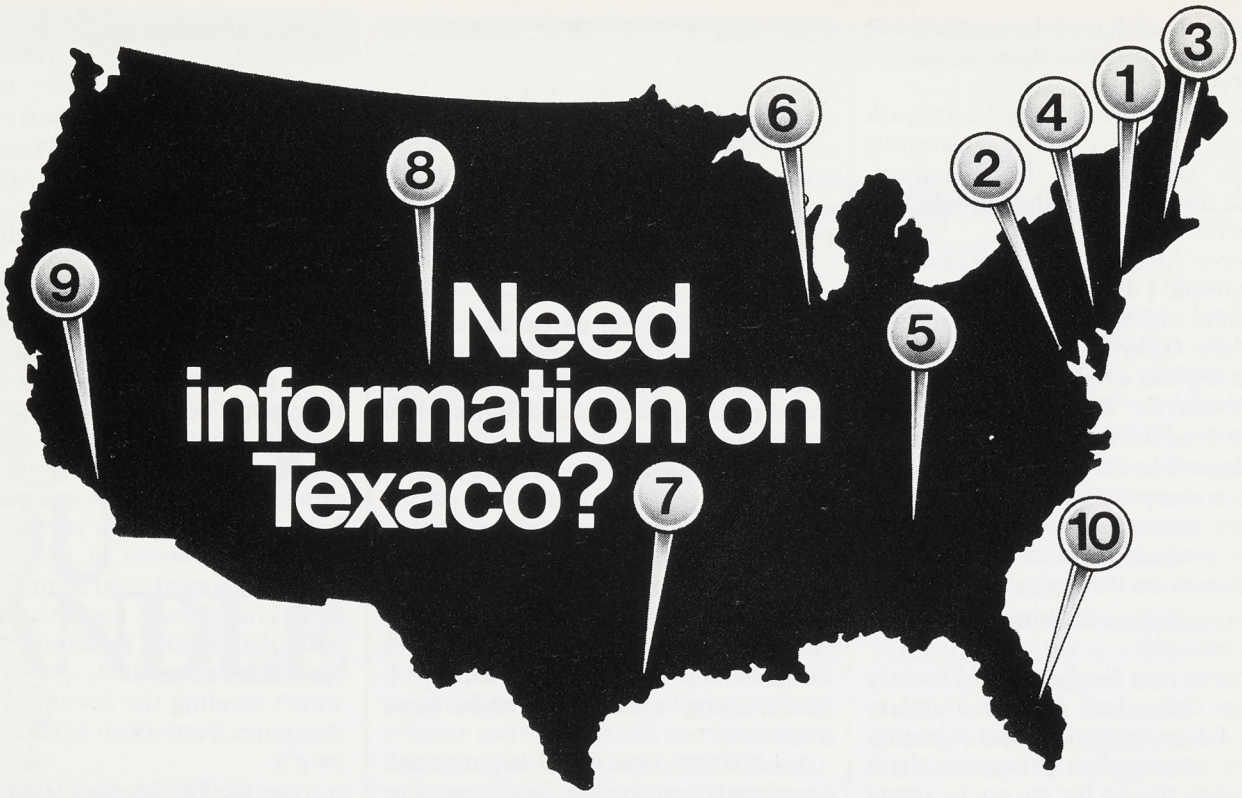
NESSON: I want to find out from reporters here whether it is a fact they would not steal a document. Now you all say, "No, of course we'd never do that." Our first TV reporter says, "Well, we peek a little." There's some suggestion that maybe Xerox copies make a difference. We're talking about the CIA here, which has operated in secrecy, and public issues of tremendous importance that people need to decide about. We're talking about a vital organization which has been engaged in secret wars and assassinations—and you are going to stop at just picking up a little document to expose all that, is that right?

1st EDITOR: Are we walking down the street and there it is on the sidewalk to be picked up? I would pick it up.

2nd EDITOR: Why did Bridges write this memoir and leave it exposed on a desk in someone's study, if this information is so invested with national-security issues? That's a failure of responsibility for a man who took an oath of office.

NESSON: So tough luck on Mr. Bridges?

2nd EDITOR: Well, I think it's a factor.



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1st PROSECUTOR: Professor Nesson, what do you mean? Are you talking about this problem in terms of ethics, or of legal exposure?

NESSON: Neither. What I'm talking about at the moment is what the editor does when a reporter comes to him; what kind of questions the editor asks; and why and what difference the answers make.

1st EDITOR: One second, just to put something in perspective. When you've got a story like this, the fact is there's an instant realization on the part of the editor and all his editors that they are headed for rough seas—and they really are. It's going to be a thorny issue. It's going to involve the public's right to know. It's going to involve the image and reputation of the newspaper, everything. So you start instinctively striving from the word go not to get yourself into a posture where your case is weak. Almost immediately, if you are in possession of a stolen document, you prepare to go all the way to the Supreme Court, where many of the Justices will throw statutes at you and say to the government, "Go after them on that." A little caution light starts blinking when somebody says, "I've got a document," and it does condition your entire behavior from then on, I promise you.

> "A little caution light starts blinking when somebody says, 'I've got a document,' and it does condition your entire behavior from then on, I promise you"

3rd EDITOR: Another question an editor should ask, being presented with highly explosive material like this, is the authenticity of the document and the sourcing. Is it possible this is part of a large plot, black information being given out to embarrass somebody? I would have doubts about some of these things. Why would somebody want to tell me this?

NESSON: Well, let's come to authenticity in just a minute. But you're saying that a questionable document lights red lights for you, and if a certain red light goes on, you don't print it. That solves all problems. Except how about me? I'm the reader out there, the public. I want to see the thing.

1st EDITOR: I've got an enormous interest in you—and I would not claim to say I would not read this document. If it tells me there is information of a reliable and extraordinary quality about infiltration of the antiwar movement by a foreign power, if I am in possession of that information, however the hell I got it, then I would set about to look for supporting information right away. I would go to these people, try to prove the story out, try to work it out. I'd see if I could corroborate it, find some evidence.

NESSON: Why does it make a difference to you that it was your reporter who stole the document rather than someone else?

1st EDITOR: I think it's called Section 793, A through F, of the U.S. penal code. All a major newspaper has got to do is get

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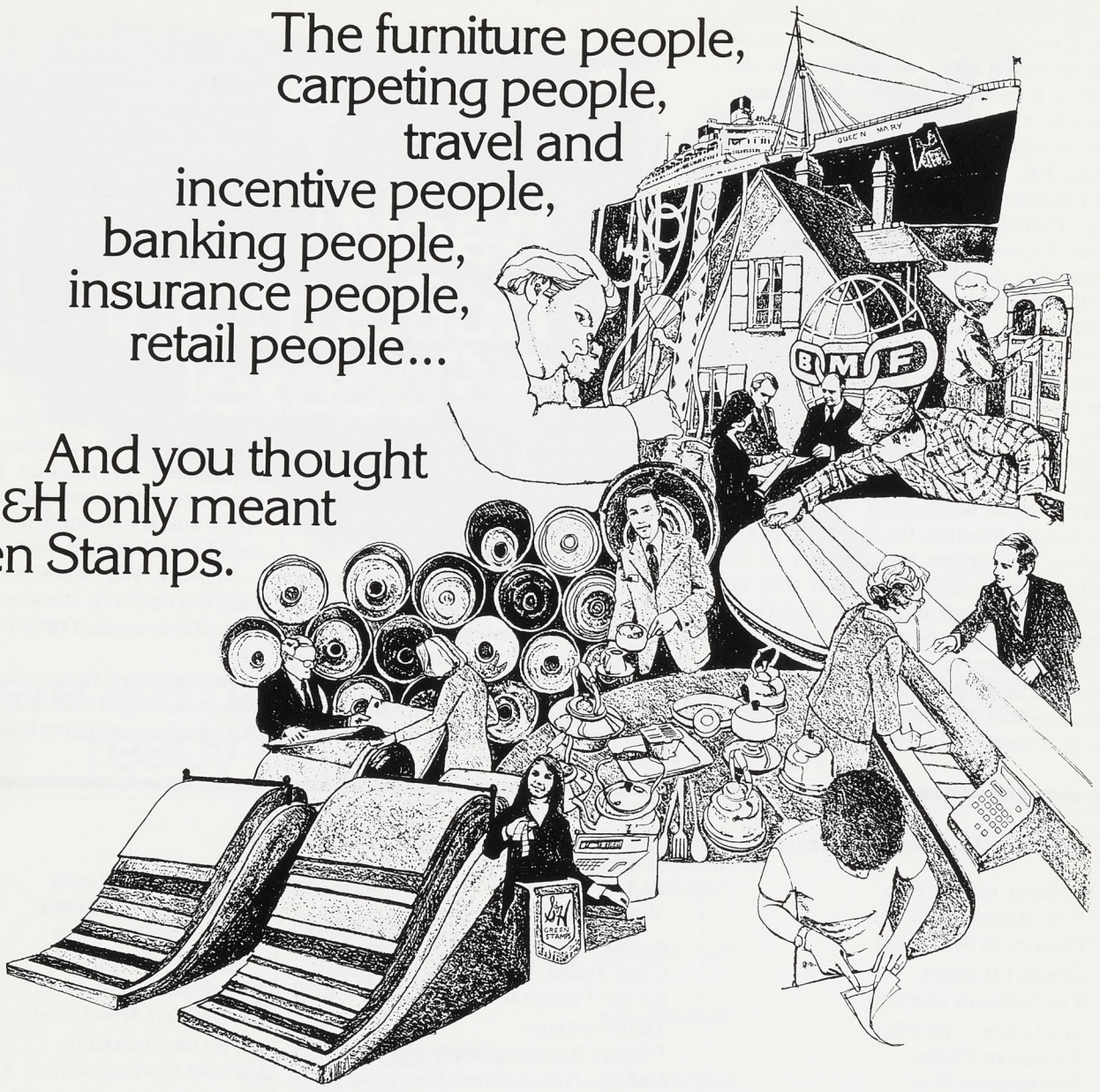

Eighty years ago you would have been right. That's when Thomas A. Sperry and Shelly B. Hutchinson started it all with a little green stamp and a big idea. The idea: give people something extra with their purchases.

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The State National Bank of Connecticut
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Magna Laboratories

indicted and convicted of theft and you've lost an awful, awful lot.

NESSON (To 2nd Editor): Do you feel the same way?

2nd EDITOR: It's not nice to steal. (Laughter)

2nd TV REPORTER: Let's put a nuance to that. Let's say the reporter talked to Bridges beforehand and said, "What about the infiltration of communist governments in the antiwar movement?" Bridges said, "I can't tell you about it—but why don't you go into my study and have a cigar."

1st EDITOR: That's an invitation to share. That's not stealing.

2nd TV REPORTER: Yes, but in a legal sense he still takes the document. We do that all the time.

1st EDITOR: I don't know enough about defense attorneys, but I suspect that it would be pretty tough to prove theft of the document.

2nd TV REPORTER: No. You're still taking an official document.

1st EDITOR: Oh, the officialness of it doesn't worry me at all, or the classification.

2nd TV REPORTER: I think I'm saying reporters do that all the time.

1st EDITOR: And so do prosecutors.

NESSON: Are we clear on what's been stolen? Is it the information we're worried about? The ideas?

1st EDITOR: No, the document itself. This piece of paper.

NESSON: No problem then if he just takes a copy.

1st EDITOR: I don't think you're out of it if you've got a Xerox copy instead of the original. But ask a lawyer.

1st JUDGE: I think technically there is a difference between having the original document itself, which would be theft, and having a copy. And there's a difference between the reporter stealing it himself, and receiving it. Now if it is the original document and is put in his hands, he may be guilty of receiving stolen property. If he gets a copy, he may not be, because then you're dealing with copyright laws, and I don't think either of the documents here—the CIA Lords report or the private memoir—is copyrighted, so you're free on those grounds.

1st PROSECUTOR: In a copyright problem the question is whether you're stealing the words themselves, the arrangement of the words, and here really there's no effort to misappropriate that.

1st JUDGE: That's the distinction I was trying to make. There's a gap in the law. Copyright covers the intellectual ideas in it. Theft of property covers the physical property, the document itself. When you get a Xerox copy of the document without the original complicity of the newspaper, then you may be home free as far as the legal liability of the editor. It's his judgment as to what he will do with the content.

1st EDITOR: Well, I don't believe xerography has so changed the law here that if my reporter stole it, takes it to a Xerox machine and gives me the copy, I'm off free. I don't believe that.

1st JUDGE: No. No. But suppose the document has been copied by a secretary in the State Department, who gave it to your reporter. Then what he has is not a State Department document *per se,* at least physically.

1st EDITOR: He was given it by this secretary, I have no problems. I mean, I've got another problem—in a Biblical sense, I'm not sure I see all that much difference. But the lawyers...

1st PROSECUTOR: I don't see where it's receiving stolen property anyway. Under the law you have to have a specific intent to defraud. There's no such intent here by the editor.

NESSON: What about the reporter who pays money to the secretary?

1st PROSECUTOR: Well, if there was a pre-existing agreement, you might have a case.

2nd REPORTER: Suppose during a week in which a reporter steals a document he receives his salary. All right? Part of his compensation is for professional output, and one item that week was the "theft" of a public document. Now has whoever signs the paycheck engaged in any less of a purchase or acquisition through illicit means?

NESSON: A little bonus.

2nd REPORTER: Bonus? No, that's different. (Laughter and simultaneous remarks)

4th EDITOR: The point the first editor made earlier is, he has to protect the integrity and credibility of the property he works for. And this is why he is not going to risk, nor would I, taking stolen property in return for a story.

1st EDITOR: No matter how bad you want it or need it.

NESSON: Suppose he doesn't know whether or not it's stolen. Would you pay for it?

1st EDITOR: Well, I could give you an actual example where someone was offered the contents of Howard Hunt's desk, by a lawyer representing a client who, it was suggested, had been sent by an official of the Committee to Re-elect the President to clean out Howard Hunt's desk on June 19, 1972.

NESSON: And what would you have done?

1st EDITOR: We would not pay for it. We would have tried like hell to suggest it was in the public duty to make these available for no money.

3rd EDITOR: Would I pay? Absolutely not.

1st EDITOR: The dangers of a set-up there are obvious enough to not... (Laughter and simultaneous remarks)

3rd TV REPORTER: That same material was wafted past us.

NESSON: Smelled too bad for you too? (Turns to 4th TV Reporter) Would you have paid for it?

4th TV REPORTER: No, I don't think so.

NESSON: How about, let's say, an interview with G. Gordon Liddy? (Laughter) Can you tell me what the difference is?

5th EDITOR: I think you always have to weigh all of the values that enter into this kind of equation. Now, buying news is repugnant to any professional journalist. And yet I think there might be instances where you felt the only way you could get important information before the public might be to pay something for it. I think in that case you might do it.

NESSON: Why is it repugnant?

5th EDITOR: Well, there's something a little bit unethical about buying information for which we have a professional staff who are supposed to obtain it through enterprise, in the normal course of their work. There's an element of bribery in it, actually. You're paying somebody to do something which is improper—violate his obligation to whoever his employer is—and he knows it.

NESSON: Yet you will go around and hound that man in every way you can in order to get him to give you the information for nothing. Isn't that equally improper?

5th EDITOR: I think sometimes he might feel he had a higher obligation than the one to his employer, and that it had to do with something more than money.

NESSON: I take it it would be totally improper to suggest there's a phenomenon that operates here similar to the antitrust problems. That is, it would be bad for business to start buying information. And God knows, look at what salaries are now paid in the ABA and the NBA, who knows what the cost

of information would be in two or three years?

1st GOVERNMENT OFFICIAL: Well, some government agencies pay for information abroad without any hesitation. (Laughter) It's a purely practical problem: you can get yourself fabrications very easily if you're too generous and too quick with money. There appear to be a whole variety of procedures where, if somebody comes and offers something particularly attractive for X number of dollars, an attempt is made to get it before any money is offered.

2nd EDITOR: I think for us in the media, at least newspapers, it comes back to what is our stock in trade. For logical reasons or otherwise, we feel that to pay for information or to make a habit of purveying documents we stole would cost us our credibility with readers, and we would lose the base of our professional existence. But it's not an absolute: there are cases where it breaks down.

1st EDITOR: And the richest newspaper would become the purveyor of the most information. It's totally evil, wrong.

1st GOVT. OFFICIAL: I'm concerned about credibility, too. The government has got to make sure the information it gets is accurate, not fabrications, so it too is concerned about credibility to its readers, a rather limited circle.

> "Now, buying news is repugnant to any professional journalist. And yet I think there might be instances"

1st JUDGE: There's quite a bit of difference. Buying information has been the stock in trade of espionage for centuries. It's legally correct. And if espionage is moral, it's morally correct. On the other hand, the editor's problem may be legally as well as morally wrong. They're two different businesses.

NESSON: Wait a second here. You're prepared to tell me that newspapers shouldn't buy information to serve their readers, when they're in the business of buying information all over the place?

1st JUDGE: Not that kind.

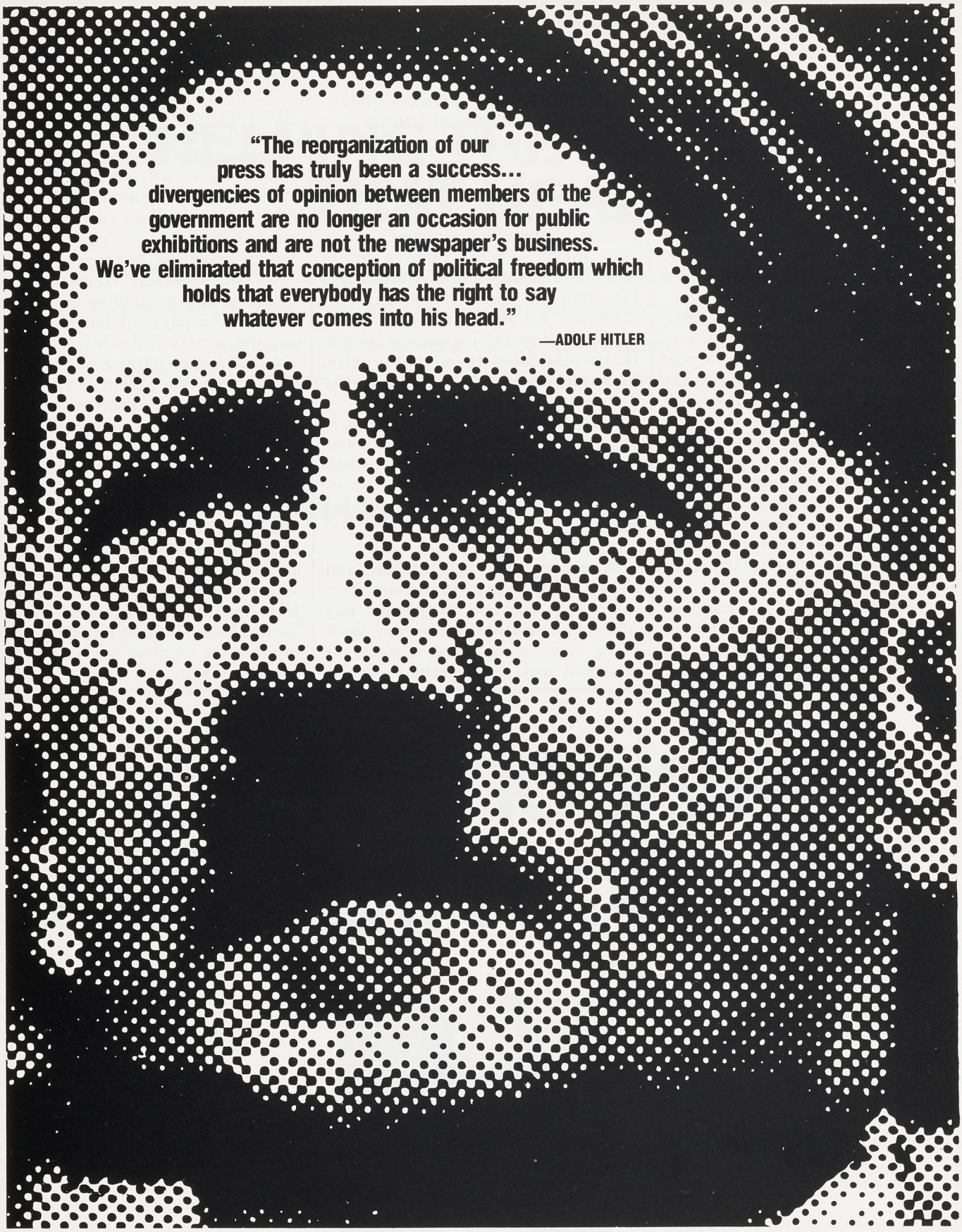
5th EDITOR: Well, it isn't that black and white at all. Newspapers and any other kind of publication frequently buy information to serve their readers. We'll ask a scientist to write a piece, or somebody with some special particular knowledge to write a piece, and they're paid for it. There's nothing illegitimate about that.

3rd EDITOR: This raises a point. A lot of newspapers and magazines are part of news-business conglomerates. During the course of Watergate, people came to you trying to sell news and you said, "Well, we don't buy news," and they said, "But you have a book company, can we work a deal. I'll give you this for the weekly magazine, but then can you get me a book contract?" And so the moral question: is it possible to get the same information, pay for it, but then run it in, say, the Sunday *Times Magazine,* or the Outlook section of the *Post?*

4th REPORTER: I really fail to see why keeping a stable of reporters and paying them to ferret out information isn't paying for information.

1st EDITOR: Well, buying the A.P. is paying for information.

2nd GOVT. OFFICIAL: I just wonder if your reporters don't feel some contradiction or tension between these moral compunctions—their concern about the various laws involved here—and their First Amendment obligation. (To the 1st Editor) I was a little surprised you didn't say that the criminal law, insofar as it interfered with this kind of flow of



The first amendment to the Constitution prevents Congress from passing any law "... abridging the freedom of speech or of the press..." This assures American citizens of their right to know by providing a free press, totally separated from the government. This advertisement is presented as a public service by Americans for a Free Press, 40 West Gay Street, Columbus, Ohio 43215

information, was unconstitutional. I was surprised you didn't say that.

1st EDITOR: There are restrictions on the First Amendment.

2nd GOVT. OFFICIAL: Yeah, but *I* don't know that... (Laughter and simultaneous remarks)

NESSON: What a marvelous argument, coming from a government official—has got to be food for thought. But, let's move on. How do you verify a story like this?

3rd EDITOR: Well, in this case of an American spy who is the finance minister of Hungary, you can feel around the edges of former agents you might know. You might check into the Hungarians you know around town. Half of them are KGB. But it's very difficult to verify. The authenticity of a document like that would give me great pause.

NESSON: Would you check the document out with the director of the CIA?

1st EDITOR: There would come a time when you would let the CIA know you had that document.

3rd EDITOR: That's right. Prior to print, in order to verify it.

1st GOVT. OFFICIAL: I should hope the government was told about it, because...

3rd TV REPORTER: I'd say right now, I think the officials who brought the Pentagon Papers case harmed their self-interest here. Because as some editors said, after all that litigation was over and they'd been held under a temporary restraining order for 15 days, "Well, next time we'll print it all the first day."

1st GOVT. OFFICIAL: Philip Agee went out of the country in order to print it. [The former CIA employee who published his book, *Inside the Company,* in Great Britain.]

3rd TV REPORTER: That's right. That's the sort of thing I fear is going to happen. I don't like to see the way the law has permeated the business of journalism. It should not be legalistic. I think we need to back away from the law if we can, and operate in an era of ethics and...

4th EDITOR: Was the second government official suggesting editors should use the First Amendment in every instance as an overriding constitutional right, a *laisser passer* to do anything?

2nd GOVT. OFFICIAL: The fact is you have two enormously important social and constitutional values in conflict here, and they're not resolved by discussing copyright laws, property laws or ethics about paying people for things. One could very easily postulate a case in which I hope you *would* pay. For example, if somebody told you he had documentary proof of government plans to set up concentration camps, I trust you would buy that story and publish it. I trust you would steal that story and publish it.

"Bought, borrowed and stolen information must have redeeming social value"

4th EDITOR: Substituting the press for the legal authorities there, is that what you want? In other words, *we* make the judgment, not you.

2nd GOVT. OFFICIAL: I think I'd have to plead the First Amendment.

1st TV REPORTER: I'd like to reformulate the second government official's doctrine: *Bought, borrowed and stolen information must have redeeming social value.*

NUMEROUS: Yes. Right.

2nd GOVT. OFFICIAL: There's no avoiding the fact you're going to wind up in court, here—a conflict between the executive need for confidentialities and the First Amendment. I think we ought to discuss the conflict in those terms. Copyright law, property law and so forth, they're really doctrines that will fall by the side. Ultimately the validity of the criminal law is going to depend upon the constitutional determination as applied to these facts.

2nd REPORTER: The question is, when it comes down to whether or not to publish, do you make that decision upon some legal premises, or upon other, larger, moral premises? Is it going to be the editor who makes the judgment, or in effect the prosecutor? One of the unhappy things is that too many times these days, I think, we in the press think first of calling a lawyer.

1st LAWYER: But even if the lawyer says you will be violating a statute here if you publish the material, or pay for it, *you* make that decision as to whether to publish or not. That is what the First Amendment's all about. Now, I've always felt that the right to publish is about as absolute a thing as there is under our Constitution. The next question is, how much do you have to be concerned about possible applicability of the criminal law? To me it is a factor. I think if you say the First Amendment is absolute and supersedes any part of criminal law—or indeed any potential civil liability—then you reach a situation where you are in great difficulty.

1st EDITOR: We're headed into this question of who the hell is any editor to decide whether something is in the national interest or not. And who the hell are these editors to decide whether it is, in fact, national security. What frustrates me about this case is it's so specific. It's awfully hard to argue that to cost five people their lives and to destroy a network of 20 people is in any way in the public interest.

3rd REPORTER: I think the national-security issue here is phony. Because I think most of us would write the story without going into how the CIA director first got the tip. The newsworthy elements are, if it's true, that the antiwar movement was dominated by foreign or communist elements, and the CIA infiltrated, wiretapped, did all these bad things. You don't need the Hungarian finance minister in it. Now, they might say, "Look, if you print anything you'll expose the Hungarian finance minister." And I would say, "Nonsense. If the Russians let him know about it, there were so many people in Moscow who knew it that the sourcing isn't all that obvious."

FORMER GOVT. OFFICIAL: I would really hope that, before printing it, a newspaper would first go to the agency, the FBI or CIA or whatever, and try to discuss what the potential problem might be. Unbeknownst to you, a revelation of this source could take place because of information you printed that didn't seem to be related.

3rd REPORTER: Sure.

1st EDITOR: I suspect that the Hungarian finance minister would have been removed six weeks before. Once Bridges reports that his study has been burgled, the CIA knows that the agent—the whole network—is compromised, and it would be out. Three or four CIA agents were named in the Pentagon Papers. No newspaper printed them, and they were all long gone before their names could have been printed, without endangering their lives at all.

4th EDITOR: I'd like to know what the CIA director's reaction would be if I confronted him and told him this is damned hot stuff, we're going to print part of it—not the text of the Lords document, but we'll refer to it—and I want to know who we're going to hurt and how badly.

1st GOVT. OFFICIAL: He would have to convince you that was right, tell you enough of the facts, the reality of the story, to convince you to cut it

down to something manageable and not disastrous.

1st EDITOR: But would you believe his answer? I consider him to have a higher national duty than to tell me the truth. Moreover, it has been my experience, and I think this is perhaps new in the last 25 years, that government officials lie to reporters with an equanimity that is mind boggling, mind boggling. If we went around believing what government officials told us, we'd be in an interesting line of work but not the one we're now in.

FORMER GOVT. OFFICIAL: I would say, in general, that's the basic principle. But in a specific case like this where lives might be in jeopardy, you have a somewhat different...

1st EDITOR: I agree in this case. But I would be goddamned suspicious. I would certainly examine the possibility that this was a part of a campaign to prove that the hippies were dominated by commies.

NESSON: Lives, so that's it. When a government official is trying to convince you not to print, one of the standards by which you're going to judge is how many dead. But suppose then you said to him, "I'll give you a week to pull those people out. I'm going to print this in a week."

1st EDITOR: I don't think I could do that. I'd resent like hell if he told me to do anything, and...

> "It has been my experience that government officials lie to reporters with an equanimity that is mind boggling, mind boggling"

3rd EDITOR: There's another question here. Supposing we know that if we don't print it the source or the secretary in the State Department would run down the street to a rival organization. And then they were going to have a big piece on it. The competitive factor sometimes weighs heavily. If we don't print it somebody else will.

1st EDITOR: You've got hundreds of factors working here. Lives. Our national interest. The public interest. The public's right to know...

1st TV REPORTER: I think we sometimes have a tendency to flounder between absolutes. But they aren't what we deal in from day to day. I suspect there are some laws we would willingly violate at certain times, and have violated—protecting a source when that might involve going to jail, and there might be other technically criminal acts we'd be willing to perform—as long as we were perceived as performing a public interest. Maybe more important to us than whether the thing is legal or illegal is, can we justify this to our readers as something that needed to be done in their interest, and will we be perceived that way? If so, we'll take our chances with the law; with the government; with a whole lot of things. But we ultimately depend on that perception from our audience. And can I submit that as one of the overriding standards?

2nd GOVT. OFFICIAL: Yes. That's the "redeeming social value" aspect.

1st JUDGE: I go along with that very well—the really multiple considerations that enter into any case. And the evaluation is made by the readers. If the readers perceive it's not in the long-run interest of the nation, of the people themselves, to have this exposed, then they will react adversely, and so the publication of the story actually has put a great strain on the First Amendment. But it all adds up: in the final analysis you've got to serve the long-range public interest—and your readers have to perceive that—to justify it.

OPC AWARDS

THE OPC PRESIDENT'S AWARD PRESENTED POSTHUMOUSLY

TO: DON BOLLES

The President's Award—given only on rare occasions, in recognition of outstanding dedication and professionalism—is presented posthumously this year to Don Bolles. A veteran investigative reporter for the Arizona *Republic,* he died June 12, 1976, in Phoenix, just 11 days after an assassin's bomb exploded under his car.

On June 2 Bolles had left word in his office that he was going to a midtown hotel to meet a man who claimed to have information about a land-fraud story. The man, John Adamson, a greyhound dog owner and former tow-truck operator, never showed up. But when Bolles backed his car out of the parking lot, a bomb exploded under the floorboard. (It had been his habit to keep the hood of his car securely taped, after earlier threats on his life.)

In the moments after the explosion Bolles mentioned "Adamson," "Mafia" and "Emprise." He had written about allegations that Emprise Corp., a Buffalo concern which controls Arizona's lucrative dog-racing tracks, had connections with organized crime.

Bolles had written extensively on other areas of crime in Arizona; the facts he uncovered had been ignored by those in power. But what his articles failed to achieve his death did. Because of the national fury aroused by his assassination, Arizona will never be the same state again. A group of reporters from Investigative Reporters and Editors converged on Phoenix and—a first in history—as a salute to Bolles, continued his investigation into crime and corruption in the state.

The day after Don Bolles' death, the Arizona *Republic* stated on page one: "He has given the last full measure of devotion for those high principles on which he stood and fought so courageously and effectively in his relentless war on crime in this community."

CLASS I: BEST DAILY-NEWSPAPER OR WIRE-SERVICE REPORTING FROM ABROAD

EDWARD CODY / ASSOCIATED PRESS
For his coverage of the civil war in Lebanon

Edward Cody is A.P. news editor in Beirut. He won the award for his "eyewitness accounts of savage Christian-Moslem fighting, illuminating analyses of political manuevering behind the fighting, and human stories about 14-year-old boys who sometimes did the fighting."

Cody joined the wire service in 1969, after working for the Charlotte (N. C.) *Observer*. He has been on the A.P.'s foreign desk since 1971.

In March 1974 Cody was sent to India to report on the Bihar food strikes which grew into Indira Gandhi's "state of emergency." In June 1975 he traveled to Delhi to help cover the Gandhi emergency—and was expelled from the country that August. He returned to his home in Beirut, where he now reports on the Lebanese war and other Middle East stories.

The judges: Henry Cassidy; Donald Shanor, Rosalind Massow.

CITATION
ROBERT L. BARTLEY / THE WALL STREET JOURNAL
For articles on China and Tibet after the death of Mao

CITATION
RAYMOND R. COFFEY / THE CHICAGO DAILY NEWS
For the general excellence of his foreign coverage

CLASS 2: BEST DAILY-NEWSPAPER OR WIRE-SERVICE INTERPRETATION OF FOREIGN AFFAIRS

FLORA LEWIS / NEW YORK TIMES

For general excellence of her analyses of foreign affairs

Flora Lewis joined the New York *Times* as head of its Paris bureau in 1972. Given the additional title of European diplomatic correspondent four years later, she has traveled all over the continent on assignments ranging from diplomatic initiatives to the Common Market.

Her distinguished record includes coverage of Navy and State Departments for the A.P. during World War II; coverage of Eastern Europe for the Washington *Post* at the time when Berlin was first divided by the Berlin Wall; and reporting in her syndicated column on the Vietnam war, the 6-Day War, and the Chicago and Miami political conventions.

She has won two OPC awards: in 1956 for magazine reporting, and in 1962 for best foreign reporting. She is also a winner of the Columbia Journalism School's 50th Anniversary award.

From her reportorial experiences have come three books: *A Case History of Hope,* on Poland; *Red Pawn,* an account of the Cold War; and *One of Our H-Bombs Is Missing,* the story of the loss and recovery of an unfused bomb in Spain.

The judges: Henry Cassidy; Donald Shanor, Rosalind Massow.

CLASS 3: ROBERT CAPA GOLD MEDAL FOR BEST PHOTOGRAPHIC REPORTING OR INTERPRETATION FROM ABROAD REQUIRING EXCEPTIONAL COURAGE AND ENTERPRISE

CATHERINE LEROY / GAMMA, TIME
For a series in *Time* on the street fighting in Beirut

Catherine Leroy is the first woman ever to win this prize since it was established by *Life* in 1955.

Born in the environs of Paris, Leroy began to take pictures while sky-diving in France. At age 21 she headed for Vietnam "with a one-way ticket and a Leica," and stayed three years (1965-68) as a stringer for A.P. and then Black Star. In 1967 she received an OPC citation for the excellence of her Vietnam photographs—having by then made her 85th air-fall, jumping with the 173rd Airborne.

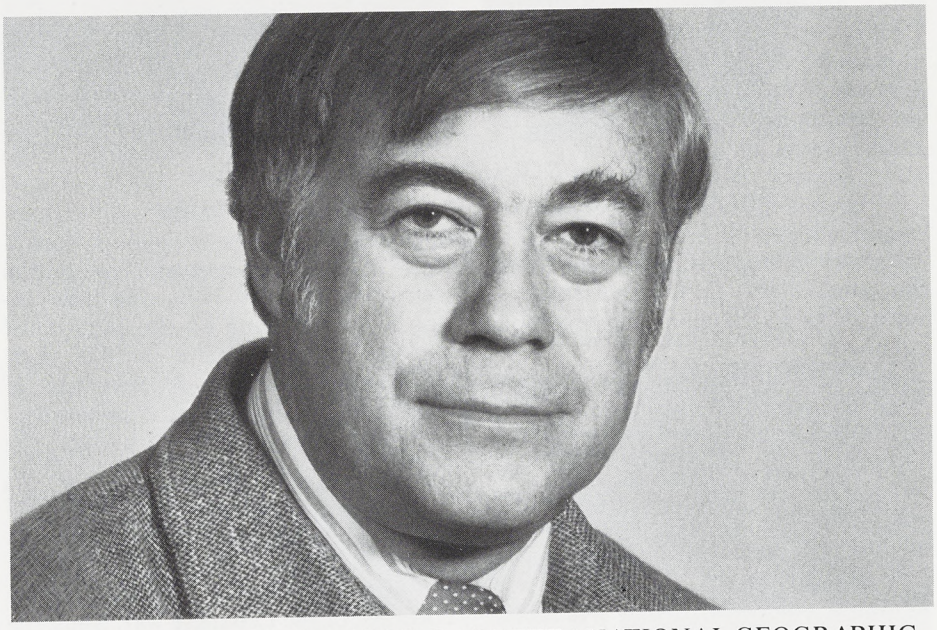
During the Tet offensive of 1968, she and a colleague were briefly prisoners of the North Vietnamese, but managed to get out her pictures and story. Features in *Look* and *Life* brought her the George Polk award from Long Island University for picture of the year in 1968.

She free-lanced in Northern Ireland, Haiti, Cuba, Cyprus, and again in Vietnam. In the United States, she directed and shot an hour-long documentary, "The Last Patrol"—the cross-country trek to Miami by hundreds of Vietnam veterans in 1972 to protest the renomination of President Nixon. It won an award at the international film festival in Leipzig in 1973.

Her base has been Beirut since June 1975.

The judges: Barrett Gallagher and Charles Rotkin; John Durniak, Francis Brennan, Arthur Rothstein.

CLASS 4: BEST PHOTOGRAPHIC REPORTING FROM ABROAD



ROBERT W. MADDEN and W. E. GARRETT / NATIONAL GEOGRAPHIC
For their coverage of the earthquake in Guatemala

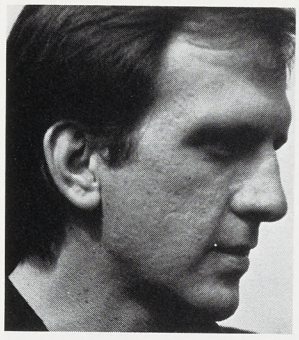
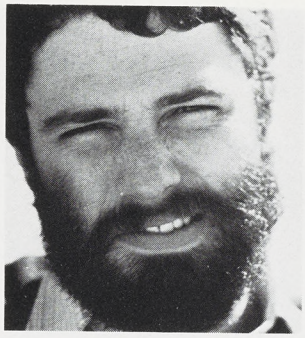
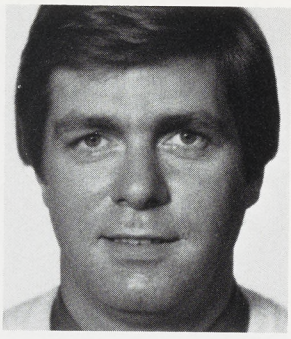
Robert Madden (top) is a staff photographer, and Bill Garrett a senior assistant editor, for the *Geographic*. The two share several parallels of background. Both, for example, are alumni of the University of Missouri. Garrett graduated with an engineering degree, and Madden did graduate work there after majoring in English and history at Wisconsin State. Both show facility with either typewriter or camera.

Both have ranged widely on *National Geographic* assignments—in Madden's case from Antarctica to Hawaii, Old Salem, the South Pacific for the recovery of Apollo 11, Venezuela, and recently West Germany.

Garrett, a onetime Navy combat photographer in Korea, holds the Magazine Photographer of the Year award from Missouri University/National Photographers Association, and the Syracuse University Newhouse Citation for significant contribution to the field of visual communication. He co-produced the award-winning *National Geographic* TV special, "Alaska."

The judges: Barrett Gallagher and Charles Rotkin; John Durniak, Francis Brennan, Arthur Rothstein.

CLASS 5: BEST RADIO SPOT NEWS REPORTING FROM ABROAD

ABC-RADIO NEWS
For "The Siege of Tel Zataar"


MIKE LEE and DOUG TUNNELL / CBS NEWS
For their coverage of the civil war in Lebanon

Members of the ABC team which won the award for their reports on a beleaguered Palestinian refugee camp in Lebanon:

William Blakemore (top left) joined ABC as a soundman in 1970. As a roving stringer, he has reported on the Bangladesh war, the Black September civil war in Jordan, and the Palestinian-Israeli conflict in South Lebanon. He won an OPC award as part of the ABC news team covering the 1974 Cyprus war.

John Cooley (no photo available), now operating out of Athens, has been with ABC News since 1967, previously reporting for NBC, CBS and Radio Press International. His coverage includes the Yemen, Pakistan, Arab-Israeli and Cyprus wars, as well as the war in Lebanon. His most recent book is *Green March, Black September: The Story of the Palestinian Arabs.*

Charles Glass (center), a four-year resident of Lebanon, was wounded two days after the fall of Tel Zataar, during a Christian mortar barrage of western Beirut. In 1974 he was researcher and assistant producer on Peter Jennings' Peabody award-winning *Sadat: An Action Biography.*

Jerry King (right) joined ABC News in 1971 and was named chief of the Beirut bureau in 1976. He was involved in reporting on the collapse of the Saigon government in 1975. And during his on-the-spot coverage of Ireland's Bloody Sunday commemoration in London, part of a bathtub hit him on the head.

Co-winners of the award are CBS news correspondent Mike Lee and reporter Doug Tunnell, for their innovative, effective and hazardous coverage of the Lebanese war. Since the CBS news bureau was located on the western, Moslem side of the "green line," it was very difficult to cover events occurring in the eastern, Christian area. Mike Lee was therefore assigned full-time, with support crews, to Beirut's eastern sector—in effect, setting up a mini-bureau there—while Doug Tunnell continued to report from the western half of the city.

With CBS the only network news organization operating full-time on both sides of the line, Lee and Tunnell were able to report the full story of the situation in Lebanon on a continuing, day-to-day basis.

The judges: Walter Kirschenbaum; Peter Wells, Richard Pyatt.

CLASS 6: BEST RADIO INTERPRETATION OF FOREIGN AFFAIRS

CBS-RADIO NEWS
For "The World Looks at America"

French President Giscard d'Estaing, Rhodesian Prime Minister Ian Smith and former Thai Prime Minister Kukrit Pramoj were among those who presented their views of America as it enters its third century, on this 30-part special. It was broadcast by the CBS Radio Network on September 18 and 19.

Anchored by Charles Collingwood (left), produced by Jonathan Ward (right), Frank Dalecki and Norman Morris (no photos available), "The World Looks at America" featured interviews conducted by CBS news correspondents around the world. Statesmen, journalists, businessmen, students of world politics, foreign citizens, all had their say.

Among others heard were elder statesman Averell Harriman, NATO Chief Alexander Haig, the president of Volvo of America, Bjorn Ahlstrom, Egypt's Director of Information Services Moursi Sahd Aldin, Buenos Aires editor Andrew Klaus Leidtke, and Israeli journalist Avraham Schweitzer.

The judges: Walter Kirschenbaum; Peter Wells, Richard Pyatt.

CLASS 7: BEST TV SPOT NEWS REPORTING FROM ABROAD

MIKE LEE / CBS-TV NEWS
For his coverage of the siege of Tel Zataar

Dallas-born, Mike Lee came to CBS via KPIX-TV in San Francisco. He joined the New York bureau in 1975 as a general reporter. His major assignments there included coverage of the New York City budget crisis and the Boston school-busing controversy.

Lee moved to the Beirut bureau as a news correspondent in October 1975. His especially courageous coverage of the eastern, Christian sector of the divided city (see page 54) made an invaluable contribution to U.S. understanding of the Lebanese war.

The judges: John L. Scott; Donald Coe, Howard Kany, Russell Tornabene.

CLASS 8: BEST TV INTERPRETATION
OR DOCUMENTARY ON FOREIGN AFFAIRS

NBC NEWS
For "New World—Hard Choices"

"New World—Hard Choices," a turn-of-the-year look at the recent past and into the future, was a three-hour broadcast produced by Dan O'Connor (no picture available), with John Chancellor (above) anchorman.

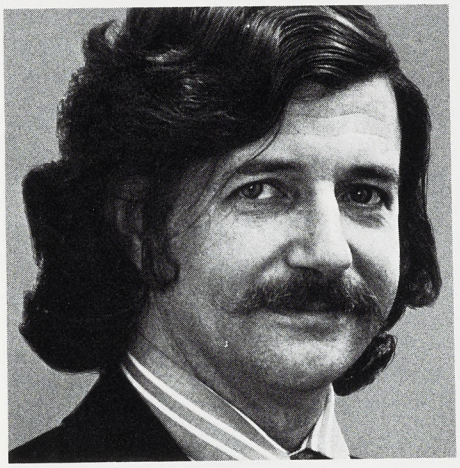
Except for two years as director of "Voice of America," Chancellor has been with NBC ever since 1950. He has covered every Presidential campaign during this period, and has served in NBC bureaus in Vienna, London, Moscow, Brussels and Berlin. His reporting has earned him numerous awards and citations. This is his third OPC award.

Producer O'Connor is director of special programs for NBC News. He was in 1963 co-producer of the first special program to use satellite transmissions from Europe: "Museums Without Walls," a telecast featuring a live exchange via satellite between the Louvre in Paris and the National Gallery of Art in Washington.

O'Connor has also produced NBC news programs at Cape Kennedy. His recent specials include the Bicentennial-year coverage of July Fourth '76, and "Violence in America."

The judges: John L. Scott; Donald Coe, Howard Kany, Russell Tornabene.

CLASS 9: BEST MAGAZINE REPORTING FROM ABROAD



NEWSWEEK
For its coverage of the civil war in Lebanon

Among top correspondents featured in the magazine's war coverage:

Barry Came (top left), a Canadian, was freelancing in the Middle East before he joined *Newsweek's* Beirut bureau in 1974. Came's fluency in both French and Arabic helped him to provide dramatic and detailed on-scene reporting from the streets of Beirut.

Tony Clifton (right) had covered wars in Vietnam and Laos—he once hiked 60 miles into Laos to provide eyewitness reports on fighting there. He lived in Beirut through the Lebanese civil war, is now correspondent in Cairo.

Loren Jenkins (lower left) joined *Newsweek* in 1970. He was expelled from Pakistan in 1971, asked to leave India in 1975, was one of the last *Newsweek* staffers airlifted out of Saigon, hours before the city's fall. He is currently chief of the Rome bureau.

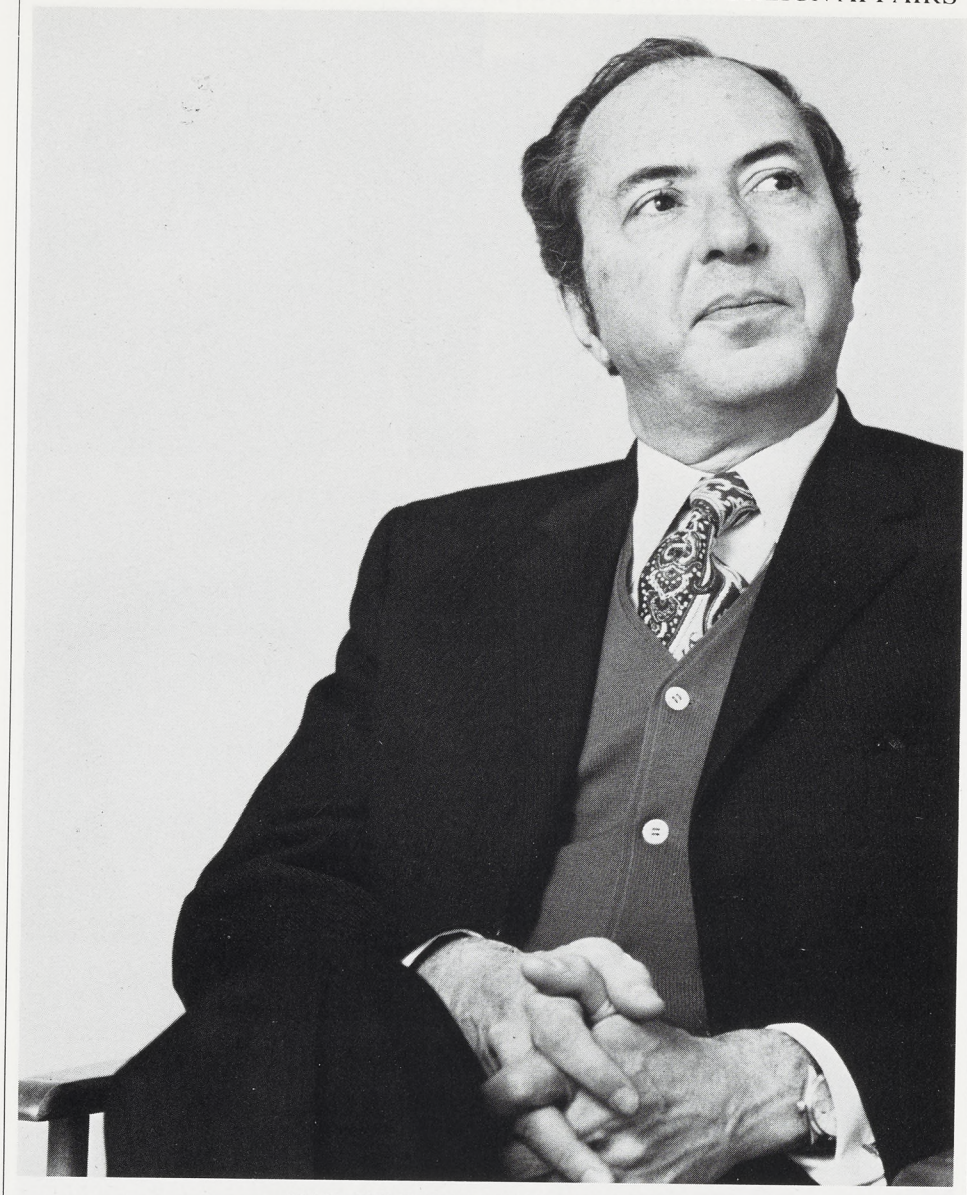
William Schmidt (right) was appointed *Newsweek's* Mideast bureau chief in April 1976. Before that he served three years on the domestic scene, covering stories on Spiro Agnew, President Nixon and his confidant Bebe Rebozo, Patty Hearst, the Panama Canal situation, and the growing danger of sharks close to the Florida coast. Headquartered in Cairo, Schmidt is a roving correspondent.

The judges: Jean Baer and Grace Naismith; Ralph Schulz, Edward Cunningham.

CITATION

JAMES N. WALLACE / U.S. NEWS & WORLD REPORT
For seven articles on the Soviet Union

CLASS 10: BEST MAGAZINE INTERPRETATION OF FOREIGN AFFAIRS



TAD SZULC / NEW REPUBLIC
For a series on the European countries, East and West

Currently foreign-affairs columnist and contributing editor for the *New Republic,* Tad Szulc was for 19 years a New York *Times* correspondent—reporting from 43 countries. He has covered most major international conferences held during the past 15 years, and has traveled with Presidents Eisenhower, Kennedy, Johnson and Nixon.

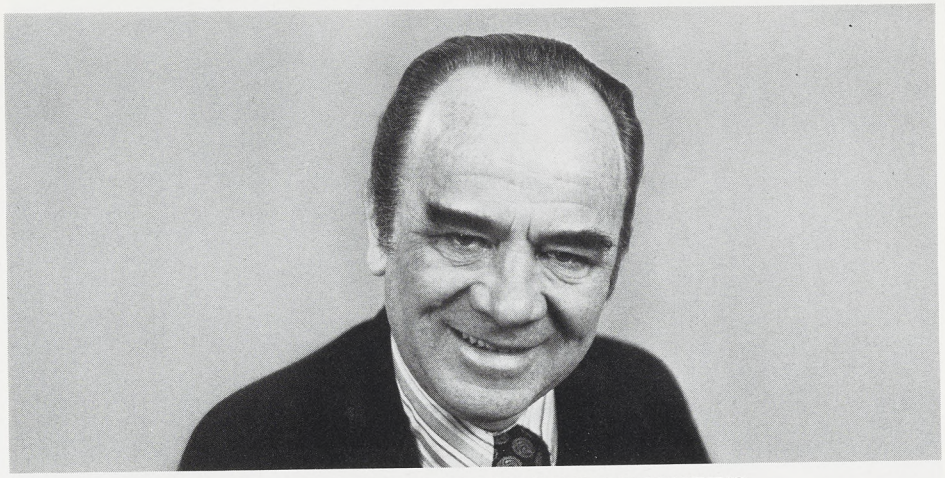
His books include: *Dominican Diary, Czechoslovakia Since World War II, Portrait of Spain,* and *The Energy Crisis.*

Among his awards are: the Maria Moors Cabot Gold Medal, Columbia University, 1959; the Sigma Delta Chi Medal, 1969; and two OPC citations.

The judges: Jean Baer and Grace Naismith; Ralph Schulz, Edward Cunningham.

CITATION
ALLARD K. LOWENSTEIN
For his article "Spain Without Franco," in *Saturday Review*

CLASS 11: BEST CARTOON ON FOREIGN AFFAIRS
($150 stipend from New York *Daily News)*



WARREN KING / NEW YORK DAILY NEWS
For his concept of Arab handling of oil prices

Chief editorial cartoonist of the *Daily News,* Warren King is also an illustrator of international note. He is a member of the Society of Illustrators, National Cartoonists Society and American Association of Editorial Cartoonists.

He has received numerous recognitions and awards— from, among others, the Overseas Press Club for best cartoon in 1973.

The judges: Bill Gallo; Steve Heller, Phillip Ritzenberg.

CITATION
TONY AUTH / PHILADELPHIA INQUIRER
For his cartoon on the Chinese rejection of Mme. Mao's power bid

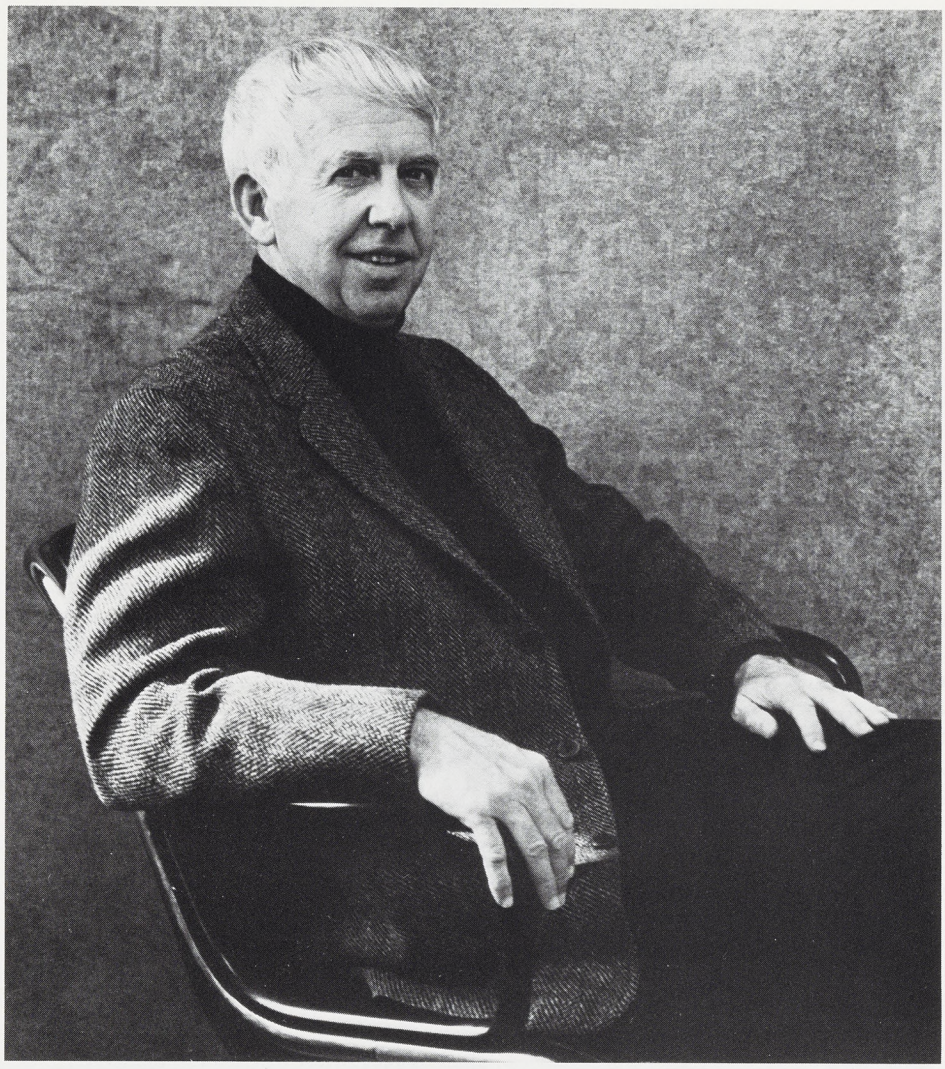
CLASS 12: BEST BUSINESS-NEWS REPORTING FROM ABROAD
($500 stipend from Bache, Halsey, Stuart)

ALFRED ZANKER / U. S. NEWS & WORLD REPORT
For articles on aspects of economic development in foreign countries

Alfred Zanker's doctorate in economics and his fluency in English, German and Swedish have helped him become an eminent international economist. During his 15 years as European economic editor of *U.S. News & World Report,* he has attended most major meetings of the International Monetary Fund/World Bank and special symposia of the European Management Forum.

The judges: Henry Gellermann; Harry Jiler, Louis Calderoni.

CLASS 13: BEST BOOK ON FOREIGN AFFAIRS



JOHN TOLAND
For *Adolf Hitler* (Doubleday)

John Toland has been acclaimed by many for this definitive biography of the man who caused more destruction than anyone else in world history.

Influenced by playwright Porter Emerson Brown, who taught him "the rudiments of the craft, as well as how to deal off the bottom of a deck," Toland began writing at the age of 14. He spent a productive but unpublished two decades before he sold his first short story.

Now the author of seven books (three of which have been OPC winners), Toland first wrote about the German dictator in *The Last 100 Days,* a best-seller later made into a motion picture. He has interviewed more than 250 persons who were acquainted with Hitler, unearthing new facts, piecing together the full story of this extraordinary individual.

For an earlier book, *The Rising Sun: The Decline and Fall of the Japanese Empire, 1936-1945,* Toland won the Pulitzer Prize.

The judges: Anita Diamant Berke; Kenneth Giniger, Hallie Burnett, Alex Liepa, Carol Smith.

CITATION
HEDRICK SMITH
For *The Russians* (Quadrangle)

CLASS 14: MADELINE DANE ROSS AWARD FOR INTERNATIONAL REPORTING IN ANY MEDIUM WHICH DEMONSTRATES A CONCERN FOR HUMANITY ($350 stipend)

JUNE GOODWIN / THE CHRISTIAN SCIENCE MONITOR
For her reporting on the Angolan crisis and on the outbreak of violence in Soweto, South Africa

In addition to filing copy to the *Monitor* on dramatic news developments as they occurred in these two troubled areas of Africa, June Goodwin supplied the newspaper with thoughtful, penetrating articles on the dilemma of the churches in South Africa; the heart-searching of those whites in both South Africa and Rhodesia who love their countries and want to help the process of change; and the emerging generation of politically articulate black teen-agers.

She also covered former Secretary of State Henry Kissinger's visit to southern Africa, when he laid the groundwork for the later Geneva meetings.

The judges: Julia Edwards; Lawrence Stessin, Marguerite Cartwright.

CITATION
RON KOVIC
For the excerpt in *Playboy* magazine from his forthcoming book, *Born on the Fourth of July* (McGraw-Hill)

CLASS 15: BOB CONSIDINE MEMORIAL AWARD FOR BEST REPORTING FROM ABROAD IN ANY MEDIUM REQUIRING EXCEPTIONAL COURAGE AND INITIATIVE
($1000 stipend from King Features Syndicate)

ROBIN WRIGHT / THE CHRISTIAN SCIENCE MONITOR
For her coverage of the Angolan conflict

While in Angola, Robin Wright twice found herself in situations of great personal danger. On both occasions she responded with remarkable courage.

As of early February 1976, Wright was the only western correspondent in Santo Antonio do Zaire. Together with British mercenaries, she escaped under gunfire when MPLA and Cuban forces arrived —bringing back to Kinshasa many exclusive news items. One was the fact that some British mercenaries had been executed by other British mercenaries.

She returned to Angola to cover the trials of the mercenaries. There, despite threats and eventual imprisonment, she maintained her objectivity as a journalist and produced extraordinary coverage of these events—news reports which resulted in her summary deportation.

The judges: John J. O'Connell; Harrison Salisbury, Frances FitzGerald.

The Great Health Care Stakes

Odds favor higher medical care costs if prescription drug prices are arbitrarily cut. A gamble? Yes, considering the following:

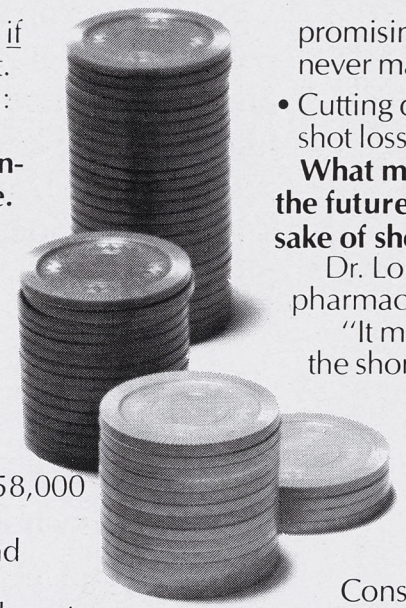
Drugs markedly reduce the costs of hospitalization, surgery, psychiatry, intensive care, and other forms of health care.

Examples:

1. Polio vaccines eliminated iron lungs, lengthy hospital stays, and saved thousands of potential victims.[1]
2. Since drugs to treat mental illness were introduced, the number of patients in mental hospitals has been more than cut in half: from 558,000 in 1955 to about 225,000 in 1974.[2]
3. Antibiotics save millions of lives and billions of health care dollars.[3]
4. Drugs that cure tuberculosis closed most sanatoriums.[4]

The stakes are these: new drugs to fight cancer, viral infections, heart ailments, psychoses and other diseases. But —

- New drugs come only from research, a very sophisticated form of roulette.
- Most new drugs are discovered by U.S. research-oriented pharmaceutical companies.[5]
- Their research funds come from current prescription drug sales.
- For every drug that's a winner, there are thousands of other promising chemical compounds that never make it to the gate.
- Cutting drug prices arbitrarily is a sure-shot loss for research investment.



What may be gambled away is much of the future progress in health care for the sake of short term savings.

Dr. Louis Lasagna, a leading clinical pharmacologist, puts it this way:

"It may be politically expedient, for the short haul, to disregard the health of the United States drug industry, but its destruction would be a gigantic tragedy."[6]

One last point: Between 1967 and 1975, according to the U.S. Bureau of Labor Statistics Consumer Price Index, the cost of all consumer items rose 61%, and medical care costs increased 69%, while prescription drug costs increased only 9%.

1. Pharmacy Times, March 1976, pp 36-39.
2. "Health in the United States," U.S. Department of Health, Education, and Welfare, 1975, p. 40.
3. National Health Education Committee, "Facts on the Major Killing and Crippling Diseases in the United States," 1971, p. 5.
4. Lambert, P.D. and Martin, A. (National Institutes of Health), Pharmacy Times, April 1976, pp 50-66.
5. deHaen, Paul, "New Drugs, 1940 thru 1975," Pharmacy Times, March 1976, pp. 40-74.
6. Lasagna, L., The American Journal of Medical Sciences, 263.72 (Feb.) 1972.

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Walter V. Carty, Senior Vice President
Hill and Knowlton, Inc.
at New York University-PRSA
Business-Financial Media Relations
Seminar, New York, February 14, 1977

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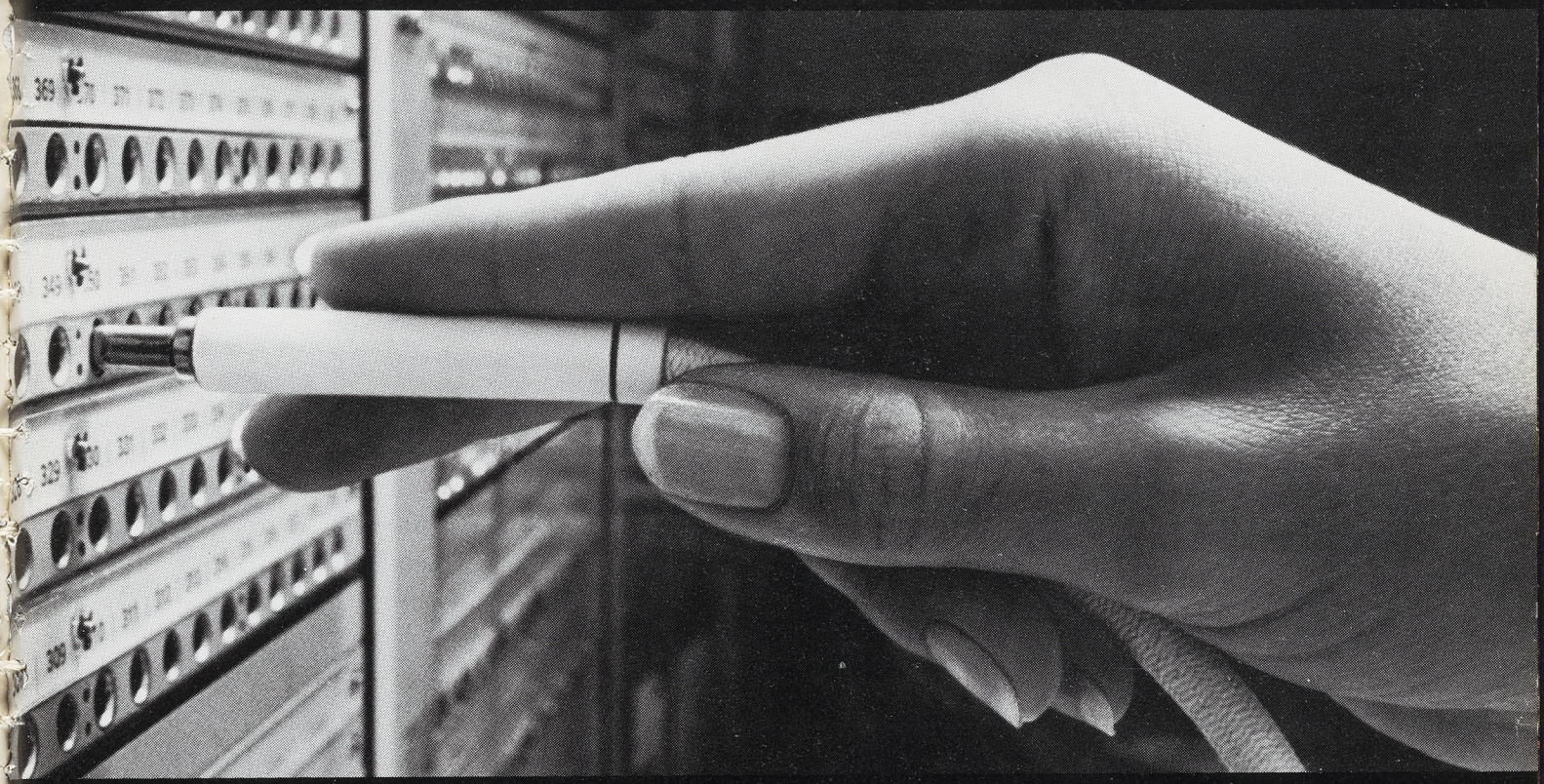

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MERIT delivers what others can only promise: the flavor of higher tar cigarettes. The kind of flavor made possible by a breakthrough in tobacco technology.

Here's how it was done:

By cracking cigarette smoke down into separate elements, researchers were able to isolate certain flavor-rich ingredients that delivered taste way out of proportion to tar.

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These flavor essentials were then packed into MERIT, giving it extraordinary flavor.

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Overall, smokers reported they liked the taste of MERIT and MERIT 100's as much as the taste of the higher tar cigarettes tested. Cigarettes with up to 60% more tar!

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And you can taste it.

Kings: 8 mg. "tar," 0.5 mg. nicotine av. per cigarette, FTC Report Dec. '76
100's: 12 mg. "tar," 0.9 mg. nicotine av. per cigarette by FTC Method.

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